Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEFFREY H. MIMS, Trustee of the Estate of Coastal Plains, Inc., and INDUSTRIAL CLEARINGHOUSE, INC.,

Petitioners,

v.

BROWNING MANUFACTURING, A Division of Emerson Power Transmission Corporation, and Formerly a Division of Emerson Electric Co.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the much-criticized doctrine of judicial estoppel should be applied in federal law cases? The Circuits are in conflict, with two Circuits having rejected the doctrine altogether. Among those Circuits that apply judicial estoppel, there are substantial conflicts about the nature, essential elements, and proper application of the doctrine.

2. Whether judicial estoppel should be applied to prevent a Chapter 7 bankruptcy trustee or a third-party purchaser from recovering on a debtor's causes of action, thereby depriving creditors of valuable property of the estate and the third-party the benefit of its purchase, when the debtor did not list the causes of action as assets on its bankruptcy schedules?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 10

I. THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO ADDRESS THE DOCTRINE OF JUDICIAL ESTOPPEL. THE CIRCUITS ARE IN CONFLICT ON WHETHER THE DOCTRINE SHOULD BE A PART OF FEDERAL LAW. EVEN THOSE CIRCUITS THAT ACCEPT THE DOCTRINE FUNDAMENTALLY DISAGREE ABOUT THE NATURE OF THE DOCTRINE, ITS ESSENTIAL ELEMENTS, AND ITS APPLICATION 10

A. Whether to Apply Judicial Estoppel in Federal Cases? – A Fundamental Conflict among the Circuits 10

TABLE OF CONTENTS – Continued

Page

B. Judicial Estoppel is an Outmoded Common Law Doctrine that Should be Abandoned .. 15

C. If Judicial Estoppel is to be Adopted, What Are its Essential Elements? – Significant Conflicts among the Circuits..... 18

II. THIS CASE PRESENTS AN IMPORTANT QUESTION AND A SPLIT IN AUTHORITY ABOUT THE USE OF JUDICIAL ESTOPPEL TO ALTER – INDEED EVEN DEFEAT – FUNDAMENTAL PROVISIONS OF THE BANKRUPTCY CODE .. 26

CONCLUSION 30

APPENDIX A (Court of Appeals Opinion) .....App. 1

APPENDIX B (Bankruptcy Court Opinion) .....App. 40

APPENDIX C (District Court Opinion) .....App. 76

APPENDIX D (Court of Appeals Order Denying Rehearing) .....App. 84

APPENDIX E (District Court Final Judgment) ..App. 88

TABLE OF AUTHORITIES

Page

CASES

American Methyl Corp. v. EPA, 749 F.2d 826 (D.C. Cir. 1984) 11

Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540 (7th Cir. 1990) 19, 26

Bates v. Long Island Railroad Co., 997 F.2d 1028 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993).....18, 26

Brown v. Felsen, 442 U.S. 127 (1979) 16, 21

Chambers v. NASCO, Inc., 501 U.S. 32 (1991)..... 17

Cleveland v. Policy Management Systems Corp., 119 S.Ct. 1597 (1999).....12, 14, 17

Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985) 28

Davis v. Wakelee, 156 U.S. 680 (1895) 14

Deloach v. Provident Health Services, Inc., 1993 WL 850445 (S.D. Ga. 1993)..... 23

Edwards v. Life Insurance Co., 690 F.2d 595 (4th Cir. 1982)..... 25

Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.), 119 F.3d 852 (10th Cir. 1997) 3, 11

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 13

Jackson Jordan, Inc. v. Plasser American Corp., 747 F.2d 1567 (Fed. Cir. 1984)..... 24

Jeffrey v. Desmond, 70 F.3d 183 (1st Cir. 1995)..... 27

TABLE OF AUTHORITIES – Continued

Page

Johnson Service Co. v. Transamerica Insurance Co., 485 F.2d 164 (5th Cir. 1973) 19

Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980) 11, 12, 19

Krank v. Utica Mutual Ins. Co., 109 B.R. 668 (E.D. Pa.), *aff'd*, 908 F.2d 962 (3d Cir. 1990) 28

Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997) 18, 25

Matter of Cassidy, 892 F.2d 637 (7th Cir.), *cert. denied*, 498 U.S. 812 (1988) 23

Miller v. Shallowford Community Hosp., 767 F.2d 1556 (11th Cir. 1985) 28

Ogden Martin Systems v. Whiting, 179 F.3d 523 (7th Cir. 1999) 19

Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988) 12, 13, 22, 29

Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956) 15

Patriot Cinemas Corp. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987) 4, 18

Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.), Inc., 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931 (1993) 12

Pereira v. Aetna Casualty & Surety Co. (In re Payroll Express Corp.), 921 F.Supp. 1121 (S.D.N.Y. 1996) 23

Rascon v. U.S. West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998) 11

TABLE OF AUTHORITIES – Continued

Page

Reynolds v. Commissioner, 861 F.2d 469 (6th Cir. 1988) 25

Risetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597 (9th Cir. 1996) 25, 26

Rockwell International Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208 (9th Cir. 1988) 18

Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996) 21, 25

Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982) 27, 28

Sturm v. Boker, 150 U.S. 312 (1893) 14

United Mine Workers of America 1974 Pension v. Pittston Co., 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993) 3, 11

Water Technologies Corp. v. Calco, Ltd., 850 F.2d 660 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988) 20

Webb v. ABF Freight System, Inc., 155 F.3d 1230 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 1253 (1999) 11

Winmark Limited Partnership v. Miles & Stockbridge, 345 Md. 614, 693 A.2d 824 (1997) 5, 12, 13, 29

Young v. United States Department of Justice, 882 F.2d 633 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990) 24

TABLE OF AUTHORITIES – Continued

Page

STATUTES

U.S. Const. Art. I, § 8 ..... 2, 14

11 U.S.C. § 323(a) 27

11 U.S.C. § 521 ..... 2, 5, 6, 26

11 U.S.C. § 541 27

11 U.S.C. § 554 ..... 2, 5, 27, 28

11 U.S.C. § 704 ..... 27, 28

11 U.S.C. § 726(a)(6) 28

11 U.S.C. § 727 (a)(1) 13

18 U.S.C. § 152 17

18 U.S.C. § 1621 17

18 U.S.C. § 1623 17

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P. 11 17

Fed. R. Evid. 804(b) 17

MISCELLANEOUS

4 *Collier on Bankruptcy* ¶ 521.06[3][b] 27, 28

4 *Collier on Bankruptcy* ¶ 521.08 17

6 *Collier on Bankruptcy* ¶ 704.08 27

Douglas W. Henkin, *Judicial Estoppel – Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991) 4, 13, 15, 17, 20

TABLE OF AUTHORITIES – Continued

Page

18 *Moore's Federal Practice* § 134.30 ..... 4, 12, 13

18 *Moore's Federal Practice* § 134.33 ..... 4, 12, 19

18 *Moore's Federal Practice* § 134.33[2] 20

18 *Moore's Federal Practice* § 134.33[4] 4, 26

18 *Moore's Federal Practice* § 134.34[2] 19

18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4477 19

PETITION FOR WRIT OF CERTIORARI

Jeffrey H. Mims, Trustee of the Estate of Coastal Plains, Inc. (the "Trustee"), and Industrial Clearinghouse, Inc. ("Industrial") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 179 F.3d 197 (5th Cir. 1999) (Appendix A, Pet. App. 1). The opinions of the bankruptcy court and district court are unreported, but are reproduced at Appendices B (Pet. App. 40) and C (Pet. App. 76), respectively.

JURISDICTION

The court of appeals entered its judgment June 18, 1999 (Pet. App. 2). The Trustee and Industrial filed timely petitions for rehearing and rehearing *en banc*. Those petitions were denied by the court of appeals August 4, 1999 (App. D, Pet. App. 84). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 8:

The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . .

11 U.S.C. § 521: Debtor's duties

> The debtor shall – (1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs.

11 U.S.C. § 554: Abandonment of property of the estate

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
>
> (d) Unless the court orders otherwise, property of the estate that is not abandoned under this

section and that is not administered in the case remains property of the estate.

STATEMENT OF THE CASE

A. Introduction

The Fifth Circuit has applied an aggressive version of federal "judicial estoppel" to reverse and render a multi-million dollar federal district court judgment in favor of the Trustee for the Bankruptcy Estate of Coastal Plains, Inc. (the "Trustee") and Industrial Clearinghouse, Inc. ("Industrial").[1] (Pet. App. 3, 39, 88). The judgment was based on a jury's findings that Respondent Browning Manufacturing ("Browning") breached contracts with Coastal Plains, Inc. ("Coastal"), and maliciously committed torts against Coastal, thereby destroying Coastal's business. (Pet. App. 9, 88).

The Fifth Circuit's decision merits review by this Court for two reasons:

First, the Circuits are in conflict about whether judicial estoppel should even be applied in federal law. The Tenth Circuit has rejected judicial estoppel altogether. *See, e.g., Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852, 858 (10th Cir. 1997). The District of Columbia Circuit has criticized the doctrine and refused to adopt it. *See, e.g., United Mine*

[1] Industrial purchased certain of the debtor's former assets from the debtor's secured creditor, which had foreclosed on the assets. The bankruptcy court found that Industrial's purchase included the debtor's causes of action for breach of contract. (Pet. App. 62).

Workers of America 1974 Pension v. Pittston Co., 984 F.2d 469, 477-78 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993).

Among those Circuits that apply some version of judicial estoppel, "[t]he specific requirements are 'rather vague' and vary from . . . circuit to circuit." *Patriot Cinemas Corp. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987); *see* Douglas W. Henkin, *Judicial Estoppel – Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711, 1721-24 (1991) (hereinafter cited as "Henkin, *Judicial Estoppel*"). The authors of *Moore's Federal Practice* have identified numerous conflicts that exist among the Circuits in the application of the doctrine. 18 *Moore's Federal Practice* § 134.33 (Matthew Bender 3d ed. 1999).

"The Supreme Court has never ruled upon or discussed the doctrine" of judicial estoppel. 18 *Moore's Federal Practice* § 134.30 at 134-62; Henkin, *Judicial Estoppel*, 139 U. Pa. L. Rev. at 1711-12.

This case presents the most far-reaching application of federal judicial estoppel yet by a Circuit and involves several questions on which the Circuits have disagreed about the nature, essential elements, and proper application of federal judicial estoppel.

Second, the Fifth Circuit's application of judicial estoppel in this case defeats a fundamental policy of the Bankruptcy Code – to liquidate and preserve a Chapter 7 debtor's assets for ratable distribution among creditors of the debtor's estate.

The Fifth Circuit applied judicial estoppel to *extinguish* the Trustee's and Industrial's causes of action against Browning because the debtor, Coastal, did not list

those claims as assets on its bankruptcy schedules filed pursuant to 11 U.S.C. § 521(1).[2] (Pet. App. 3). Even though the Trustee had no part in the debtor's making of the perceived inconsistent statements about its claims, the Fifth Circuit barred the Trustee from recovering on those claims for the benefit of Coastal's unpaid creditors. (Pet. App. 3).

Before this case, bankruptcy law was clear: if a debtor failed properly to disclose an asset during a Chapter 7 bankruptcy case, that asset would remain property of the debtor's bankruptcy estate, held for the benefit of creditors, unless and until the asset was abandoned with approval of the bankruptcy court under 11 U.S.C. § 554. But here, the Fifth Circuit applied judicial estoppel to preclude the Trustee from recovering on the estate's causes of action, thereby destroying a valuable asset of the estate and punishing creditors because of claimed inconsistent positions taken by their debtor.

On this important question of federal bankruptcy law, the Fifth Circuit's decision conflicts with the recent opinion of Maryland's highest court in *Winmark Limited Partnership v. Miles & Stockbridge*, 345 Md. 614, 693 A.2d 824 (1997).

B. Proceedings Below.

Coastal, the debtor in this case, was a distributor of industrial spare parts. (Pet. App. 3). Browning, which

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[2] As discussed below, the debtor also agreed to a stipulation proposed by the debtor's secured creditor, which placed a low estimated value on the debtor's general intangible assets. (Pet. App. 6, 67-69).

manufactures spare parts and was Coastal's principal supplier (Pet. App. 4), breached contracts and committed the tort of conversion by refusing to return an essential inventory of spare parts to Coastal. Browning also tortiously interfered with Coastal's prospective contractual relationships. (Pet. App. 5, 9).

As a result of Browning's actions, Coastal filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. (Pet. App. 4-5, 42). One week later, Coastal commenced this action within its Chapter 11 proceeding by filing and serving an adversary complaint against Browning. (Pet. App. 5, 43). Coastal's complaint pleaded for an order requiring Browning to return Coastal's inventory and also alleged claims for damages for conversion, breach of contract, and tortious interference. (Pet. App. 43, 64). The bankruptcy court promptly conducted a hearing and ordered Browning to return Coastal's inventory (Pet. App. 5, 43). Coastal's damages claims remained pending. (Pet. App. 5, 43).

After the bankruptcy court ordered Browning to return Coastal's inventory, Coastal filed its schedules of assets and liabilities pursuant to 11 U.S.C. § 521(1). Coastal did not list its pending claims against Browning as an asset on those schedules and did not classify its unsecured trade debt to Browning as disputed, contingent, or subject to setoff. (Pet. App. 5-6).

Thereafter, Coastal's principal secured creditor, Westinghouse Credit Corporation ("Westinghouse"), moved the bankruptcy court to lift the automatic stay so that Westinghouse could foreclose the lien it held against certain of Coastal's assets. (Pet. App. 6, 49). Coastal initially

opposed Westinghouse's lift-stay motion, but later withdrew its opposition and stipulated to the proposed findings of fact Westinghouse had prepared for the lift-stay hearing. One of those proposed findings estimated the value of Coastal's intangible assets at $20,000. (Pet. App. 6, 49). Browning also withdrew its opposition to Westinghouse's motion to lift the stay; thus, Westinghouse's motion was unopposed. (Pet. App. 6, 49-50). The bankruptcy court lifted the automatic stay by signing an agreed order presented by Westinghouse and Coastal. (Pet. App. 50-51).

Even though Coastal's complaint against Browning remained pending in the bankruptcy court through all of these events, the Fifth Circuit construed Coastal's failure to list its claims against Browning on its schedules or to characterize its debt to Browning as being subject to setoff, and Coastal's stipulation to the approximate value Westinghouse placed on Coastal's intangibles for the lift-stay motion, to be "representations" by Coastal that it had no claims against Browning. (Pet. App. 23).

The stay was lifted and Westinghouse was allowed to foreclose at public auction. (Pet. App. 6, 50-53). Browning attended the auction and made an unsuccessful bid (Pet. App. 6, 52). Westinghouse submitted the highest and successful bid. (Pet. App. 6, 52). Several months after the foreclosure auction, Industrial (formed by Coastal's former chief executive officer) purchased certain of Coastal's former assets from Westinghouse for $1.24 million. (Pet. App. 7, 53). That purchase was later found by the bankruptcy court to have included Coastal's breach of contract claims against Browning. (Pet. App. 8, 61-62). On the other hand, the bankruptcy court found that Coastal's *tort*

claims against Browning were not included in Westinghouse's foreclosure sale or Westinghouse's later sale to Industrial. (Pet. App. 8, 63). Thus, Coastal's tort claims remained at all times the property of Coastal's bankruptcy estate. (Pet. App. 63).

Coastal's Chapter 11 reorganization proceeding was converted to Chapter 7 liquidation, and the Trustee was appointed. (Pet. App. 7).

The Trustee and Industrial entered into an agreement to prosecute the contract and tort claims against Browning jointly and to divide any recovery 85 percent to Industrial and 15 percent to the Trustee for the benefit of Coastal's unsecured creditors. (Pet. App. 8, 77). For its larger share of any recovery, Industrial undertook to pay all attorneys' fees and other costs of the litigation. Without the Trustee's sharing agreement with Industrial, he would have lacked resources to pursue any causes of action against Browning. (Pet. App. 82). The bankruptcy court approved the Trustee's sharing agreement with Industrial. Browning appealed that approval to the district court and the Fifth Circuit, but both courts affirmed the bankruptcy court. (Pet. App. 8, 81-82).

The bankruptcy court held an evidentiary hearing on Browning's affirmative defenses of judicial estoppel, equitable estoppel, and res judicata. (Pet. App. 41). The Bankruptcy court found as facts that Browning, the Trustee, and Westinghouse were aware at all material times of the existence and prosecution of Coastal's claims against Browning and were not misled by Coastal's failure to list the claims in its schedules. (Pet. App. 64-65, 80). The bankruptcy court also found that Coastal, its principals, and attorneys had not engaged in any fraud

on the court and that Coastal's failure to list its claims against Browning was inadvertent. (Pet. App. 68, 80). In addition, the bankruptcy court found that Westinghouse, not Coastal, supplied the evaluation of Coastal's intangibles for the lift-stay stipulation, that no one intended to mislead by omitting Coastal's pending adversary action from the stipulation, and that the stipulation was not intended to include Coastal's tort claims, which remained the property of the estate. Browning appealed the bankruptcy court's findings to the district court, which affirmed the findings. (Pet. App. 69-71, 79-81).

The adversary action, now prosecuted jointly by the Trustee and Industrial, was tried to a jury in district court. (Pet. App. 9). The jury found that Browning breached its contracts with Coastal, converted Coastal's property, breached a fiduciary duty to Coastal, and tortiously interfered with Coastal's prospective contractual relationships. The jury awarded the Trustee and Industrial $5 million in breach of contract damages, $2.5 million for conversion, $1.75 million for breach of fiduciary duty, $1.3 million for tortious interference, and $7.5 million in punitive damages. On Browning's post-judgment motions, the district court ordered the Trustee and Industrial to elect one cause of action on which to recover and, under protest, they elected judgment based on the verdict for breach of contract. (Pet. App. 9). The district court entered judgment in favor of the Trustee and Industrial jointly for $5.2 million. (Pet. App. 9, 88).

On Browning's appeal, the Fifth Circuit reversed and rendered, holding that the bankruptcy court abused its discretion by failing to judicially estop both the Trustee and Industrial from prosecuting their causes of action against Browning. (Pet. App. 10, 23-24). The Fifth Circuit

denied the Trustee's and Industrial's motion on rehearing to allow them to change their election in order to have judgment on the jury's verdict for conversion, since the tort claims remained the property of the estate and are not subject to any of the Fifth Circuit's criticisms of Coastal, Westinghouse's foreclosure, or Industrial's purchase of assets from Westinghouse.[3]

REASONS FOR GRANTING THE PETITION

I.

THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO ADDRESS THE DOCTRINE OF JUDICIAL ESTOPPEL. THE CIRCUITS ARE IN CONFLICT ON WHETHER THE DOCTRINE SHOULD BE A PART OF FEDERAL LAW. EVEN THOSE CIRCUITS THAT ACCEPT THE DOCTRINE FUNDAMENTALLY DISAGREE ABOUT THE NATURE OF THE DOCTRINE, ITS ESSENTIAL ELEMENTS, AND ITS APPLICATION.

A. Whether to Apply Judicial Estoppel in Federal Cases? – A Fundamental Conflict among the Circuits.

There is a clear and well-developed conflict among the Circuits on the fundamental question whether judicial estoppel should be part of federal law. The Tenth Circuit has rejected the doctrine in federal cases, and the District of Columbia Circuit has disapproved the doctrine. On the other hand, the Fifth Circuit applied the doctrine in this

[3] As the bankruptcy court stated, the tort claims, as property of the estate, should not be subject to Browning's judicial estoppel defense. (Pet. App. 70).

case to extinguish causes of action that a jury had found highly meritorious.

"The Tenth Circuit has firmly established that it will not be bound by the doctrine of judicial estoppel." *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1242 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 1253 (1999). In *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1998), the Tenth Circuit reviewed its jurisprudence as follows: "We rejected the doctrine of judicial estoppel in *Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956). We again refused to apply the doctrine in *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991)." The Tenth Circuit declined to apply judicial estoppel in the bankruptcy context in *Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852, 858 (10th Cir. 1997).

The District of Columbia Circuit has "not . . . embraced the doctrine of judicial estoppel," *United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993), and has expressed doubt about the wisdom of the doctrine, which the court described as " 'out of harmony with [the modern rules of pleading]' and at odds with the truth-seeking function of courts of law." *American Methyl Corp. v. EPA*, 749 F.2d 826, 833 n.44 (D.C. Cir. 1984). In a decision applying District of Columbia law, the D.C. Circuit observed that "judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a discernable modern trend in that direction." *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980). The court continued: "Judicial estoppel has yet to make its way into the law of this jurisdiction,

and we do not believe that there is any tendency in favor of its adoption." *Id.* at 940.

Other Circuits apply differing versions of the doctrine, with varying degrees of vigor. *See Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 1597, 1601 (1999); 18 *Moore's Federal Practice* §§ 134.30 & 134.33. The Fifth Circuit's far-reaching application of the doctrine in this case conflicts with rejection of the doctrine altogether in the Tenth and D. C. Circuits. In addition to the Fifth Circuit in this case, the First and Third Circuits have applied judicial estoppel to bar litigation of claims not listed in Chapter 11 debtors' bankruptcy schedules, disclosure statements, or confirmed plans. *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.), Inc.*, 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931 (1993); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988).[4]

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[4] The Fifth Circuit's application of judicial estoppel in this case goes beyond the decisions in *Payless* or *Oneida*. Those cases arose from *Chapter 11* bankruptcies, from which corporate debtors emerged with confirmed plans for reorganization to continue in business, without having disclosed *in any way* during the Chapter 11 proceedings that they had claims against their later-named defendants. After the debtors' plans were confirmed and their estates revested in them, they filed lawsuits in forums other than the bankruptcy courts to recover on undisclosed pre-petition claims.

In this case, Coastal disclosed its causes of action against Browning in the bankruptcy court one week after it filed its bankruptcy proceeding by filing and serving its adversary complaint. (Pet. App. 5, 43). Thus, Coastal's claims were never "hidden" from the bankruptcy court or from Browning (Pet. App. 64, 81), as were the claims in *Payless* and *Oneida*.

Unlike the Chapter 11 debtors in Payless and Oneida, Coastal, a Chapter 7 debtor, was liquidated. As a corporate

Recently, the Court of Appeals of Maryland refused to apply judicial estoppel to bar prosecution of causes of action not listed on a debtor's bankruptcy schedules. *Winmark Limited Partnership v. Miles & Stockbridge*, 345 Md. 614, 693 A.2d 824 (1997). Maryland's highest court held that the interests of unpaid creditors, who would benefit from successful prosecution of the claims, outweighed the asserted justifications for judicially estopping the debtor. The Maryland court rejected the result reached by the Third Circuit in *Oneida* because that result did not protect the interests of the creditors. *Winmark Limited Partnership*, 693 A.2d at 827-31.

As applied by the Fifth Circuit in this case, judicial estoppel was outcome determinative. Yet, the Tenth and D.C. Circuits would not have applied judicial estoppel at all had this appeal arisen in one of those Circuits. With the Fifth Circuit's decision in this case, the conflict in the Circuits' holdings has sharpened.

Although this Court has mentioned judicial estoppel in a footnote, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975), commentators agree that the Court has never decided whether, or under what circumstances, the doctrine applies in federal law. 18 *Moore's Federal Practice* § 134.30 at 134-62; Henkin, *Judicial Estoppel*, 139 U. Pa. L. Rev. at 1711-12.[5]

Chapter 7 debtor, Coastal was neither entitled to, nor did it receive, a discharge from its debts. 11 U.S.C. § 727 (a)(1). Coastal did not emerge from bankruptcy to "start over with a new bundle of rights," as do reorganized Chapter 11 debtors.

[5] Last term, the Court addressed a Circuit split regarding the use of judicial estoppel to bar an employee who has received disability benefits under the Social Security Act from also

Petitioners respectfully suggest that the conflict among the Circuits whether judicial estoppel is a proper part of federal law is particularly problematic in bankruptcy law. The Constitution gives Congress a mandate to "create uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4. Because the conflicting views of the Circuits about judicial estoppel, bankruptcy law remains far from uniform.

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pursuing a claim as a qualified individual with a disability under the Americans with Disabilities Act. *Cleveland v. Policy Mgmt. Sys. Corp.*, 119 S.Ct. 1597, 1601 (1999). The Third Circuit applied judicial estoppel to foreclose such claims. The Fifth Circuit created a presumption in favor of judicial estoppel. Other Circuits refused to apply judicial estoppel to bar such claims. *See id.* at 1600-01. This Court held that there is no inherent conflict between the two statutes and thus did not reach the existence or requirements of federal judicial estoppel. Accordingly, the Court rejected the Fifth Circuit's presumption that asserting both claims raises judicial estoppel. *Id.* at 1602.

In addition, language in two of this Court's opinions from more than a century ago is consistent with restrictive formulations of judicial estoppel. In *Davis v. Wakelee*, 156 U.S. 680, 689 (1895), the Court focused on detrimental reliance by the opposing party. As discussed in this petition, the Fifth Circuit in this case rejected reliance by the opposing party as an element of judicial estoppel. In *Sturm v. Boker*, 150 U.S. 312, 333-34 (1893), the Court refused to estop a party on the basis of his statements of opinion on questions of law. The Court also found that the statements "did not mislead or induce either the defendants or the insurance companies to alter or change their positions." *Id.* at 335-36.

B. Judicial Estoppel is an Outmoded Common Law Doctrine that Should be Abandoned.

This case presents an excellent illustration of the principal vice of judicial estoppel: the doctrine defeats the search for the truth. The doctrine "discourage[s] the determination of cases on the basis of the true facts as they might be established ultimately." *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956); *see* Henkin, *Judicial Estoppel*, 139 U. Pa. L. Rev. at 1712 (Judicial estoppel enables parties "to prevent the disposition of otherwise meritorious cases."). Judicial estoppel, when applied, freezes a party to the first of two inconsistent statements, without examining or caring whether that statement is true. In this case, the doctrine was applied to freeze third-parties, the Trustee and Industrial, to the original *omissions* – interpreted by the Fifth Circuit to be *representations* – of the debtor.

There can be no doubt that the Fifth Circuit's appellate-level application of judicial estoppel defeated truth in this case. The district court conducted a full trial, and a jury found the Trustee's and Industrial's breach of contract and tort claims against Browning to be both meritorious and valuable. But as the result of the Fifth Circuit's decision, the jury's verdict, which established the true facts of this case, was subordinated to other interests the Fifth Circuit thought of greater importance. This case offers this Court a rare opportunity to consider whether the doctrine of judicial estoppel should be a part of federal law in the light of a jury verdict already on the record that clearly demonstrates the high cost of applying judicial estoppel.

This case presents an important policy question similar to that in *Brown v. Felsen*, 442 U.S. 127 (1979). There, the Court granted certiorari to decide whether bankruptcy courts should be bound by ordinary principles of res judicata as they decide whether a state court judgment against a debtor is nondischargeable because it was based on the debtor's fraud or malicious conduct. The Court balanced the costs and benefits of applying res judicata in that context as follows:

> Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry. Petitioner contends, and we agree, that here careful inquiry reveals that neither the interests served by res judicata, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served by foreclosing petitioner from submitting additional evidence to prove his case.

442 U.S. at 132.

Granting this petition would enable this Court to decide the equally important question whether the benefits of judicial estoppel are worth the high costs illustrated by this case: disregarding a jury's verdict and entering a judgment directly in conflict with the jury's verdict; punishing creditors for the alleged misdeeds of their debtor; depriving Industrial of the benefit of its purchase of Coastal's assets from Westinghouse; and granting Browning – an undoubted wrongdoer against whom a jury awarded millions of damages for breaching

contracts and maliciously committing torts – an unjust windfall.

This case also provides the opportunity for the Court to consider whether there are other effective deterrents to the making of inconsistent statements that are neither so costly to the process nor draconian to all who suffer the effects of judicial estoppel. For example, the rules of evidence allow factfinders to hear and consider parties' inconsistent testimony and statements against interest. Fed. R. Evid. 804(b). *See* 4 *Collier on Bankruptcy* ¶ 521.08 (Matthew Bender 15th ed. 1999) (debtor's schedules are admissible in civil and criminal litigation). At the trial of this case, Browning was free to present – and did present – Coastal's supposedly inconsistent statements about the existence and value of its claims against Browning to the jury.

In addition, as the Court recently observed, courts have power to grant summary judgment on the basis of a party's unexplained prior statements that defeat its case. *See Cleveland*, 119 S.Ct. at 1603-04. The courts have power to sanction lawyers and unrepresented parties who file pleadings that lack evidentiary support. Fed. R. Civ. P. 11. They have inherent powers to set aside judgments and impose sanctions if they find they have been misused. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). And of course, there are criminal penalties for intentional concealment of assets in bankruptcy and false swearing. 18 U.S.C. §§ 152, 1621, 1623.

With the other tools available, the high costs of applying judicial estoppel outweigh the doctrine's benefits. *See* Henkin, *Judicial Estoppel*, 109 U. Pa. L. Rev. at

1743-55 (arguing that judicial estoppel should be abandoned as too costly and unnecessary given the rules of evidence and procedure).

C. If Judicial Estoppel is to be Adopted, What Are its Essential Elements? – Significant Conflicts among the Circuits.

Even if this Court concludes that some version of judicial estoppel should be applied by the federal courts, there remains a need for the Court to give consistency to the doctrine. There are substantial disagreements among the Circuits about the nature of judicial estoppel, its essential elements, and how the doctrine should be applied.

The First Circuit has characterized the requirements of judicial estoppel as "vague," and observed they vary from Circuit to Circuit. *Patriot Cinemas, Inc.*, 834 F.2d at 212. The Fourth Circuit has concluded that the "[c]ourts have had difficulty in formulating a specific test for determining when judicial estoppel should be applied." *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997). The Second Circuit stated that "[t]he doctrine [of judicial estoppel] has not been uniformly adopted by federal courts and its elements have never been clearly defined in this Circuit." *Bates v. Long Island Railroad Co.*, 997 F.2d 1028, 1037 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993). The Ninth Circuit acknowledged that "[t]he judicial estoppel doctrine . . . is applied differently among the circuits." *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210-11 (9th Cir. 1988).

The authors of *Moore's Federal Practice* have collected many of the cases illustrating disagreements among the Circuits about the elements of judicial estoppel. 18 *Moore's Federal Practice* § 134.33. Professors Wright, Miller, and Cooper describe three different "approaches" in use among the federal courts that apply judicial estoppel. 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4477 (West 1981). *See also* Henkin, *Judicial Estoppel*, 139 U. Pa. L. Rev. at 1721-24.

There even is a conflict among the Circuits about the nature of judicial estoppel. The Circuits disagree on whether "federal" judicial estoppel applies in diversity cases, or federal courts should apply the relevant state's law of judicial estoppel. *Compare Ogden Martin Systems v. Whiting*, 179 F.3d 523, 527 n.1 (7th Cir. 1999) (presenting the rationale for applying federal judicial estoppel in diversity cases) *with Konstantinidis*, 626 F.2d at 937, and *Johnson Service Co. v. Transamerica Insurance Co.*, 485 F.2d 164, 174-75 (5th Cir. 1973) (applying state law of judicial estoppel in diversity cases). *See* 18 *Moore's Federal Practice* § 134.34[2].[6] If the Circuits should apply "federal" judicial estoppel in all cases, there is no justification for that law differing substantially from Circuit to Circuit.

Variations from Circuit to Circuit in the law of judicial estoppel create particular difficulties for patent law. The Federal Circuit held that in patent cases, it must

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[6] *See Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1550-51 (7th Cir. 1990), in which Judge Easterbrook described the choice between applying federal or state judicial estoppel to state law claims as a "hard choice," since the doctrine is a "hybrid between substance and process that on occasion affects the outcome."

apply the law of judicial estoppel of the Circuit to which the appeal would lie but for the Federal Circuit's exclusive jurisdiction over patent appeals. *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660, 665 n.3 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988). As one commentator has observed: "This raises the bizarre possibility that the Federal Circuit could be required to apply as many as ten different formulations (including not applying it at all, because the Tenth and District of Columbia Circuits reject the doctrine) of judicial estoppel." Henkin, *Judicial Estoppel*, 139 U. Pa. L. Rev. at 1721-22 n. 61. Surely the nation's patent law should not produce such disparate results.

This case presents several of the conflicts that exist among the Circuits that apply judicial estoppel:

(1) Most courts recognizing judicial estoppel apply the doctrine only upon finding that the party making inconsistent statements did so with intent to deceive. *See* 18 *Moore's Federal Practice* § 134.33[2]. In this case, the Fifth Circuit acknowledged the requirement of intent to deceive (Pet. App. 14-15), but then created a rule of "inferred intent" (in effect an irrebuttable presumption) that virtually eliminates any requirement to *prove* intent to deceive in bankruptcy cases. The Fifth Circuit held that courts must infer that a debtor who failed to list claims on its schedules intended to deceive if: (1) the debtor had knowledge of the claims and (2) conceivably had a motive to conceal the claims. (Pet. App. 24-27).

Because the bankruptcy court findings of fact in this case conflicted with the Fifth Circuit's rule of an "inferred intent" to deceive, the Fifth Circuit disregarded those findings of fact. (Pet. App. 23-24). The bankruptcy court previously had found as facts, after a full evidentiary

hearing at which the persons responsible for Coastal's omissions testified in person, that Coastal's failure to list its claims against Browning was inadvertent and that Coastal, its officers, and its bankruptcy attorneys did not intend to deceive. (Pet. App. 64-65, 67-71, 79-81).

The Third Circuit expressly rejected a similar rule of "inferred intent" in bankruptcy nondisclosure cases in *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362-65 (3d Cir. 1996). The Third Circuit held that whether a debtor had an evil intent should be decided by a finder of fact, with the debtor given an opportunity to explain its statements, just as such matters of intent are determined in other types of cases. *Id.* at 364-65.

The Fifth Circuit's rule of inferred intent is also at odds with this Court's strongly-stated preference for the resolution of fact questions in the bankruptcy courts through use of traditional tools for seeking truth. Rejecting the application of res judicata to decide dischargeability questions in *Brown v. Felson*, the Court wrote:

> Refusing to apply res judicata here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud, and malicious conversion which petitioner alleges. These questions are now, for the first time, squarely in issue. They are the types of question Congress intended that the bankruptcy court would resolve. That court can weigh all the evidence, and it can also take into account whether or not petitioner's failure to press these allegations at an earlier time betrays a weakness in his case on the merits.

442 U.S. at 138. The same teaching is applicable here, except that in this case, the bankruptcy judge before whom all of Coastal's supposedly-offending conduct occurred already held an evidentiary hearing, as contemplated by this Court, and found as a fact that Coastal did not intend to deceive.

The Fifth Circuit relied heavily on the Third Circuit's opinion in *Oneida Motor Freight*, 848 F.2d 414, in which a divided panel affirmed a district court's decision to estop a reorganized Chapter 11 debtor from prosecuting in state court an undisclosed pre-petition claim against its bank. (Pet. App. 25-27). But *Oneida* simply illustrates the need for full development of the facts surrounding a debtor's nondisclosure before making any decision about judicial estoppel. *Oneida* does not call for a rule of inferred intent. The Third Circuit majority emphasized that the Chapter 11 debtor had not disclosed the claims against the bank *in any manner* during the Chapter 11 proceedings. Specifically, the majority faulted the debtor for *not* filing an adversary action or a counterclaim against the bank within the Chapter 11 proceedings. 848 F.2d at 418-419. Here, Coastal did just that. (Pet. App. 43, 64).

In contrast to *Oneida*, the bankruptcy court and Browning, the defendant in this case, were always aware of Coastal's claims. (Pet. App. 64, 80-81). It would be hard to find, as a matter of objective fact, that a debtor intended to deceive by failing to list claims that it already disclosed to the court, the defendant, and the public by filing an adversary complaint. (*See* Pet. App. 81). It was only through the Fifth Circuit's application of its newly-announced irrebuttable presumption that Coastal was

held to have the requisite intent to deceive in this case. (Pet. App. 27).

(2) This case presents a significant question of what parties should be precluded by judicial estoppel. Here, the Fifth Circuit employed judicial estoppel to eliminate Coastal's claims completely, even in the hands of the innocent Trustee. The Seventh Circuit follows an opposite rule: judicial estoppel "does not eliminate a claim or defense, but only prohibits a particular party from asserting it." *Matter of Cassidy*, 892 F.2d 637, 642 (7th Cir.), *cert. denied*, 498 U.S. 812 (1988).

The Fifth Circuit provided no explanation of why the Trustee should be judicially estopped. Normally, courts do not attribute the perceived wrongdoing of a debtor to a trustee. *See, e.g., Pereira v. Aetna Casualty & Surety Co. (In re Payroll Express Corp.)*, 921 F.Supp. 1121 (S.D.N.Y. 1996) ("Assuming that [the debtor] would be judicially estopped if it were the plaintiff in this case, it does not follow that judicial estoppel should apply to [the debtor's] trustee."); *Deloach v. Provident Health Services, Inc.*, 1993 WL 850445 (S.D. Ga. 1993) (*Oneida* is "not applicable to the present case because the presence of the bankruptcy trustee as a plaintiff in this case creates standing and renders judicial estoppel inappropriate.").

The Fifth Circuit also extended judicial estoppel to Industrial, which purchased Coastal's potential breach of contract claims from Westinghouse, seemingly by applying an appellate-level theory of "de facto merger," "alter ego," or "piercing the veil." The court emphasized that Coastal and Industrial had a common CEO and were in the same business. (Pet. App. 7, 29-30). The Fifth Circuit's decision on this aspect of the case raises serious questions

about the nature of judicial estoppel. Is judicial estoppel a rule of substantive law that extinguishes a potential claim, regardless who owns the claim at the time? If it is a sanction for supposedly "playing fast and loose with the courts," against whom may such a sanction be applied?

(3) The case presents the question whether detrimental reliance by the opposite party is an element of judicial estoppel. The Fifth Circuit held that detrimental reliance by the party seeking judicial estoppel is not required and thus that Browning's "non-reliance on the nondisclosure" is irrelevant. (Pet. App. 12, 22-23). But in *Young v. United States Department of Justice*, 882 F.2d 633, 639 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990), the Second Circuit wrote: "The key ingredient [in whether to apply judicial estoppel] is reliance." *See also Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1580 (Fed. Cir. 1984) ("[W]e see no justification for wholly dispensing with reliance and prejudice as minimum requirements under the doctrine of preclusion of inconsistent positions.").

(4) This case presents important questions about the "judicial acceptance" or "prior success" element of judicial estoppel. *See* 18 *Moore's Federal Practice* § 134.33[4]. The version of judicial estoppel that the Fifth Circuit applied in this case contained only two elements: (1) inconsistent statements and (2) judicial success. (Pet. App. 13-14).

But the Fifth Circuit's threshold for finding "judicial success" was so low that the element provides very little check, if any, on the application of judicial estoppel. The Fifth Circuit held that the "judicial success prong" was

satisfied when the bankruptcy court signed an agreed order lifting the automatic stay, on Westinghouse's unopposed motion, based in part on a stipulation that Coastal's general intangibles were valued at $20,000. (Pet. App. 23).

In holding that the lift-stay order was sufficient "judicial success," the Fifth Circuit relied on a statement from the Fourth Circuit, quoted by the Sixth Circuit, that acceptance by a court, *"either as a preliminary matter* or as part of a final disposition," satisfies the requirement of judicial acceptance. *Reynolds v. Commissioner*, 861 F.2d 469, 473 (6th Cir. 1988) (*quoting Edwards v. Life Insurance Co.*, 690 F.2d 595, 599 n.5 (4th Cir. 1982)) (emphasis added). (Pet. App. 14). The Fourth Circuit's statement began as *dicta* in a footnote, without citation to authority. *Edwards*, 690 F.2d at 599 n.5. In a later opinion, the Fourth Circuit emphasized the importance of "judicial acceptance," noting that the requirement is what "insure[s] that judicial estoppel is applied in the narrowest of circumstances." *Lowrey*, 92 F.3d at 224.

The Seventh Circuit "agrees with those courts that limit judicial estoppel to taking a position inconsistent with one underlying a prior *judgment*. The offense is not taking inconsistent positions so much as it is winning, twice, on the basis of incompatible positions." *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (emphasis added).

The Third Circuit recently held there is no independent requirement of judicial acceptance at all. *Ryan Operations*, 81 F.3d at 361. (Pet. App. 14 n.5). In *Risetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600-02 (9th Cir. 1996), the Ninth Circuit described the "majority"

and "minority" views that exist among the Circuits on whether "judicial acceptance" is a necessary element of judicial estoppel.

(5) The case also presents the question whether success by a *third party* – here Westinghouse in an *uncontested* lift-stay motion (Pet. App. 49-50) – suffices to invoke judicial estoppel against the Trustee and Industrial. Some Circuits have held that a settlement cannot suffice to establish "judicial acceptance" because it does not involve any judicial fact-finding. *See, e.g., Bates,* 997 F.2d at 1038 (2d Cir.). Other Circuits disagree. *See, e.g., Risetto,* 94 F.3d at 604-05 (9th Cir.); 18 *Moore's Federal Practice* § 134.33[4].

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION AND A SPLIT IN AUTHORITY ABOUT THE USE OF JUDICIAL ESTOPPEL TO ALTER – INDEED EVEN DEFEAT – FUNDAMENTAL PROVISIONS OF THE BANKRUPTCY CODE.

The language and objectives of Chapter 7 of the Bankruptcy Code are clear and complete, yet the Fifth Circuit thought it necessary to import the common law doctrine of judicial estoppel – not mentioned by the Bankruptcy Code – to enforce and reemphasize the Code's requirement of disclosure. 11 U.S.C. § 521(1). (Pet. App. 17-18). The Fifth Circuit's overlaying of judicial estoppel onto the Bankruptcy Code does more harm than good. Indeed, application of judicial estoppel here defeats the fundamental objective of Chapter 7 – to collect and liquidate a debtor's assets for the benefit of the creditors.

The Fifth Circuit applied judicial estoppel because of a policy concern that a debtor who fails to disclose an asset in bankruptcy should not be allowed to emerge from bankruptcy and profit from the non-disclosure. (Pet. App. 30). But the Bankruptcy Code addresses this problem, without any necessity for resort to judicial estoppel.

In Chapter 7 cases, such as here, the debtor's undisclosed causes of action remain forever the property of the debtor's bankruptcy estate. 11 U.S.C. § 554(d). When Coastal filed for bankruptcy, all of its legal and equitable property interests, whether fixed, contingent, liquidated, or unliquidated, and whether disclosed or not, became the property of its bankruptcy estate. 11 U.S.C. § 541(a). The bankruptcy estate was vested with title to all of Coastal's assets, including its causes of action, and only the Trustee may pursue or dispose of those causes of action. 11 U.S.C. §§ 323(a), 704; *Jeffrey v. Desmond*, 70 F.3d 183, 186-87 (1st Cir. 1995).

Indeed, the Trustee is obligated to seek and identify undisclosed causes of action and other unscheduled assets that belong to the estate. 11 U.S.C. § 704(4); see *Stein v. United Artists Corp.*, 691 F.2d 885, 892 (9th Cir. 1982); 6 *Collier on Bankruptcy* ¶ 704.08.

Bankruptcy Code section 554 controls the disposition of undisclosed assets of the debtor. Title to unscheduled property of the estate may be abandoned by the Trustee only after notice, hearing, and approval by the bankruptcy court under 11 U.S.C. § 554(a) & (b); 4 *Collier on Bankruptcy* ¶ 521.06[3][b] ("Upon closing of the case, only *scheduled* property that has not been administered is abandoned under section 554(c)."). In a Chapter 7 case, absent an abandonment under section 554, there can be

no revesting of property in the debtor unless all creditors have been paid. 11 U.S.C. § 726(a)(6). Simply put, property that is not scheduled by the debtor or administered remains the property of the estate forever, unless the bankruptcy court otherwise orders. 11 U.S.C. § 554(d).

Thus, the Code already prescribes the remedy for debtors who do not disclose assets. Justice Kennedy, while a Circuit Judge, explained the similar scheme for handling undisclosed claims of the debtor that existed under Chapter XI of the former Bankruptcy Act. *Stein*, 691 F.2d at 890-92.[7] As Justice Kennedy explained, debtors cannot assert title to undisclosed claims because such claims remain the property of the debtor's bankruptcy estate to be pursued only by the Trustee as the fiduciary for the estate. *Id. See* 4 *Collier on Bankruptcy* ¶ 521.06[3][b] (a debtor's failure to schedule property does not affect the custody of the court over that property).

Congress has enacted a statutory system that requires the Trustee to maximize and liquidate the value of the property of the estate. 11 U.S.C. § 704(1); *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 352 (1985). But in this case, the Fifth Circuit judicially estopped the Trustee from carrying out his duty, imposed by the Bankruptcy Code, to recover for the benefit of creditors on claims that are assets of the estate. The Fifth

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[7] Justice Kennedy's explanation in *Stein* is fully applicable under the Bankruptcy Code. *See, e.g., Miller v. Shallowford Community Hosp.*, 767 F.2d 1556, 1560 (11th Cir. 1985); *Krank v. Utica Mutual Ins. Co.*, 109 B.R. 668, 669 (E.D. Pa.), *aff'd*, 908 F.2d 962 (3d Cir. 1990).

Circuit's decision also deters third parties (such as Industrial) from purchasing property that was once in the estate of the debtor for fear that a prior failure to disclose by the debtor might be imputed to them through application of judicial estoppel.

Recently, the Court of Appeals of Maryland refused to apply judicial estoppel to bar a former Chapter 11 debtor from pursuing causes of action not disclosed in bankruptcy. *Winmark Limited Partnership,* 693 A.2d at 826-31. The Maryland court reasoned that applying judicial estoppel to undisclosed causes of action produces unwarranted and unnecessary harm to creditors. The court noted that even after a Chapter 11 reorganization is closed, the bankruptcy court may reopen the estate for collection and distribution of additional sums to creditors.[8] The Maryland court expressly considered and rejected the Third Circuit's *Oneida* decision, on which the Fifth Circuit relied in this case, because that opinion fails to protect the interests of the creditors.

The application of judicial estoppel to deprive creditors and the bankruptcy estate of valuable property interests is a recurring problem that defeats the plan of the Bankruptcy Code. The Fifth Circuit's decision in this case presents an opportunity for this Court to examine

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[8] There is no need to reopen Coastal's bankruptcy case. That case remains open and the Trustee remains in office to protect the interests of Coastal's unpaid creditors. In this Chapter 7 case, there is not even an issue of potentially-unfair revesting of undisclosed causes of action in the debtor. Coastal does not own the claims, it is in liquidation, and the claims, now reduced to judgment, belong jointly to the Trustee and Industrial.

whether judicial estoppel should be applied in this context, where the costs to creditors and third-parties are great.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In The Matter of: COASTAL PLAINS, INC., Debtor.

**Browning Manufacturing,
Appellant/Cross-Appellee,**

v.

Jeffrey H. Mims, Trustee for the Bankruptcy Estate of Coastal Plains, Inc.; Industrial Clearinghouse, Inc., Appellees/Cross-Appellants.

Industrial Clearinghouse, Inc., Successor in interest to Coastal Plains Inc.; Jeffrey H. Mims, Trustee of The Estate of Coastal Plains, Inc., Appellees/Cross-Appellants,

v.

Browning Manufacturing, formerly known as Emerson Electric Company, formerly known as Emerson Power Transmission Corporation, Appellant/ Cross-Appellee.

**In The Matter Of:
Coastal Plains, Inc., Debtor.**

Industrial Clearinghouse, Inc.; Jeffrey H. Mims, Trustee of The Estate of Coastal Plains, Inc., Appellees-Appellants,

v.

Browning Manufacturing, formerly a Division of Emerson Electric Company, Appellant-Appellee.

**In The Matter Of:
Coast Plains, Inc., Debtor.**

Browning Manufacturing, Appellant,

v.

Jeffrey H. Mims, Trustee for the Bankruptcy Estate of Coastal Plains, Inc.; Industrial Clearinghouse, Inc., Appellees.

Industrial Clearinghouse, Inc., Successor in interest to Coastal Plains, Inc.; Jeffrey H. Mims, Trustee for the Bankruptcy Estate of Coastal Plains, Inc.; Appellees,

v.

Browning Manufacturing, formerly known as Emerson Electric Company, formerly known as Emerson Power Transmission Corporation, Appellant.

Nos. 97-11118, 97-11119 and 98-10246.

United States Court of Appeals,
Fifth Circuit.

June 18, 1999.

Harry M. Reasoner, Marie Roach Yeates, Penelope E. Nicholson, Scott J. Atlas, Gwendolyn Johnson Samora, William Richard Thompson, II, Vinson & Elkins, Houston, TX, Robbi B. Hull, Vinson & Elkins, Austin, TX, Edward F. Kohnke, IV, Joseph N. Mole, Michael Raudon, Phillips, Frilot, Partridge, Kohnke & Clements, New Orleans, LA, Raymond Arno Just, Howard Rice, Nemerovski, Canady, Falk & Rabkin, San Francisco, CA for Appellant/Cross-Appellee.

Michael Vance Powell, Morris Harrell, Cynthia Keely Timms, Locke, Liddell & Sapp, Dallas, TX, Jody Gene Sheets, Douglas Clay Holcomb, Amaarillo [sic], TX, Stephen Wilson Elliott, Kline & Kline, Oklahoma City, OK, David Patrick Long, Patton Boggs, Dallas, TX, for Appellees/Cross-Appellants.

M. Bruce Peele, Plano, TX, for Mims.

Appeals from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, POLITZ and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

For all but one of the claims at hand, the overarching issue is whether the bankruptcy court abused its discretion by not judicially estopping plaintiffs Industrial Clearinghouse and the Trustee for the bankruptcy estate of Coastal Plains from pursuing claims against Browning, Coastal's largest unsecured creditor; the linchpin being whether nondisclosure of those claims in Coastal's bankruptcy schedules or its stipulation for lifting the automatic bankruptcy stay to allow Coastal's largest secured creditor to foreclose on Coastal's assets, later purchased by Industrial Clearinghouse (formed by Coastal's CEO), falls under the exception to judicial estoppel advanced by plaintiffs, Coastal's successors – that, even though Coastal had knowledge of the claims, the nondisclosure was nevertheless "inadvertent". For plaintiffs' one claim not subject to judicial estoppel (tortious interference), the key issue is whether it is time-barred. Browning appeals the $5.2 million judgment on a jury verdict in favor of plaintiffs; plaintiffs cross-appeal the substantial post-verdict reduction in damages. We *REVERSE* and *RENDER* judgment for Browning.

I.

Coastal Plains, Inc., an equipment distributor, was purchased by Bill Young in 1984 for approximately $9

million. The business plan included making Browning Manufacturing, formerly a division of Emerson Electric Company, Coastal's leading supplier.

In January 1986, Coastal acknowledged its financial problems to its creditors and implicitly threatened bankruptcy if they did not agree to a workout plan, pursuant to which Coastal would return to its creditors inventory they had sold on credit to Coastal; the creditors would pay Coastal 50 percent of the inventory's cost and write off Coastal's debt; and the money so raised would be paid to Coastal's secured lender, Westinghouse Credit Corporation. Many creditors rejected the proposal.

The next month, owed $1.3 million by Coastal, Browning agreed to a transaction which tracked Coastal's earlier proposed workout plan. In late February 1986, Coastal began returning inventory to Browning; this was soon discontinued because Browning's parent, Emerson, wanted to postpone the transaction until the next quarter.

Accordingly, in mid-March, Coastal and Browning agreed that, if the transaction was not completed by 3 April, Browning would transfer the returned-inventory back to Coastal. The inventory-return to Browning was completed by the end of March.

Nevertheless, becoming more concerned about Coastal's potential bankruptcy, Browning did not complete the transaction (payment, etc.) by 3 April. Therefore, Coastal demanded that Browning return the inventory not later than 20 April.

But, on 16 April, Young, for Coastal, signed a voluntary Chapter 11 bankruptcy petition, which was filed on

22 April. Coastal advised its creditors that bankruptcy had become necessary because all of them had not accepted its proposed workout plan. Coastal owed in excess of $8.5 million to Westinghouse, and approximately $8 million to other creditors. Browning was Coastal's largest unsecured creditor.

A week after filing its petition, Coastal initiated an adversary proceeding against Browning, seeking an order both enjoining it from disposing of the returned-inventory and directing its transfer to Coastal. Coastal also claimed conversion; interference with contracts and/or business relationships because of Browning's failure to return inventory; punitive damages; and violation of the automatic stay.

The complaint did not specify the amount of damages sought, and there were no allegations that Browning's actions caused the failure of Coastal's pre-bankruptcy workout plan. (Concerning this critical point for judicial estoppel purposes, discussed *infra*, Coastal's bankruptcy attorney testified at a bankruptcy hearing seven years later that *the primary purpose of the adversary proceeding was the inventory-return.*)

Shortly after the adversary proceeding was filed, the bankruptcy court found that Browning had violated the automatic stay and ordered the inventory returned to Coastal; the other claims were not addressed. Browning completed the inventory-return before the end of May.

Soon thereafter, on 6 June, Wayne Duke, Coastal's CEO, executed sworn bankruptcy schedules for Coastal. But, although he believed that Coastal had claims of up to $10 million against Browning, they were *not* disclosed in

the bankruptcy schedules and statement of financial affairs. And, although Coastal's $1.3 million debt to Browning was listed in the schedule of liabilities, it was *not* specified as contingent, disputed, or subject to setoff.

Three months later, on 9 September, in moving for relief from the automatic stay so that it could foreclose on Coastal's assets, Westinghouse (secured lender) asserted that it was owed in excess of $8 million by Coastal; that this debt was nearly equal to the value of the collateral; and that reorganization was not possible. On 18 September, Westinghouse and Coastal submitted in support of the lift-stay motion a stipulation, prepared by Westinghouse, that included estimates of the value of Coastal's assets, including that its general intangible assets consisted of computer software programs, customer lists, and vendor lists, with a total worth less than $20,000. *No mention was made of any claims against Browning.* The stipulation showed more than a $5 million shortfall between the value of Coastal's assets and its debt to Westinghouse.

Browning withdrew its objection to lifting the stay. On 19 September, the day after the stipulation was filed, Westinghouse's lift-stay motion was granted; it foreclosed on Coastal's assets, conducting an auction on 7 October. *No mention of Coastal's claims against Browning was made in the foreclosure notices or advertisements, or at the auction.*

A Browning representative attended the auction and bid on the inventory. The highest bid on Coastal's general intangibles (*which, again, were not described as including its claims against Browning*) was $2,000. Westinghouse was the successful bidder, purchasing the assets for $3.25 million.

On 8 October, the day after the auction, and pursuant to negotiations the preceding month prior to executing the lift-stay stipulation, Westinghouse entered into a consignment agreement with Industrial Clearinghouse, Inc. (IC), to sell the assets Westinghouse had purchased at the auction. IC had been formed by Coastal's CEO, Duke, who was also IC's CEO; that same day, all of Coastal's employees became IC employees; and it used the same computer software and customer lists that had been used by Coastal.

In February 1987, IC purchased the remaining Coastal assets from Westinghouse for $1.24 million. Those assets expressly included the previously undisclosed "potential cause of action against Browning".

The Chapter 11 reorganization was converted to a Chapter 7 liquidation that April. After the Trustee filed a no-asset report and applied for closing the bankruptcy case, it was closed in February 1988.

But, the case was re-opened that March, to address issues unrelated to Browning. That April, after IC advised the Trustee that it wanted the claims against Browning prosecuted, and the Trustee refused, because a successful conclusion would benefit only IC, IC advised it would pursue the adversary proceeding. In October 1988, IC was substituted for Coastal in the long dormant (since May 1986) adversary proceeding against Browning.

IC filed its first amended complaint in March 1989, alleging that Browning's breach of the return-inventory agreements and return-delay caused Coastal's bankruptcy and demise; and asserting claims for breach of contract, conversion, interference with contracts and/or

business relationships, fraud, and violation of the automatic stay. A second amended complaint was filed in late 1989; a third, in early 1992.

In September 1992, the Trustee again moved to close the case and for his discharge. IC filed its fourth amended complaint that December.

The adversary proceeding was set for trial in May 1993 in the district court, which had withdrawn the reference from the bankruptcy court. But, on the eve of trial, the Trustee moved to intervene, claiming that Coastal's bankruptcy estate owned the claims being pursued against Browning. The district court referred the case to the bankruptcy court for the ownership determination.

In bankruptcy court, Browning asserted, *inter alia*, that, based on Coastal's nondisclosure in its bankruptcy schedules and the lift-stay stipulation, IC and the Trustee were equitably *and* judicially estopped. Regarding judicial estoppel, IC responded that the claims had been omitted through counsel's oversight.

Following a July 1993 hearing, the bankruptcy court ruled that the estate owned the tort claims; IC, those in contract. Contemporaneously, IC and the Trustee agreed to share any recovery against Browning, with IC to receive 85 percent.

In May 1994, following a hearing that January, the bankruptcy court approved the Trustee/IC (plaintiffs) sharing agreement and, *inter alia*, rejected judicial estoppel. Browning appealed to the district court, which affirmed; and to our court, which affirmed approval of the sharing agreement, but dismissed Browning's appeal

as to judicial estoppel, holding that the ruling was interlocutory. (Most unfortunately, Browning did *not* seek certification from the district court that, pursuant to 28 U.S.C. § 1292(b), the judicial estoppel ruling "involve[d] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation".)

At trial in district court in early 1996 (ten years after the adversary proceeding was filed), the jury found against plaintiffs' fraud claim; but, *inter alia,* awarded them $5 million for breach of contract, $2.5 million for conversion, $1.75 million for breach of fiduciary duty, $1.3 million for tortious interference, and $7.5 million in punitive damages.

Browning's new trial motion was denied; its motion for judgment as a matter of law, granted in part. The court found insufficient evidence for breach of fiduciary duty; ordered plaintiffs to elect a recovery from among the three remaining substantive awards; reduced punitive damages to $4 million; granted Browning a $1.4 million setoff; denied its motion to set aside the bankruptcy court's judicial estoppel ruling; and limited prejudgment interest.

Plaintiffs elected, under protest, to recover for breach of contract (concomitantly, no punitive damages). The final judgment awarded damages of $3.6 million ($5 million for contract breach less $1.4 million setoff), and $1.6 million for attorney's fees and costs.

II.

Among numerous issues presented, Browning claims judicial estoppel, except for the tortious interference claim. Plaintiffs cross-appeal. We hold that plaintiffs are judicially estopped, except for the interference claim; it is time-barred.

A.

Although we are the second court to review the bankruptcy court's judicial estoppel ruling, we review it "as if this were an appeal from a trial in the district court". *Phoenix Exploration, Inc. v. Yaquinto (Matter of Murexco Petroleum, Inc.)*, 15 F.3d 60, 62 (5th Cir.1994). Because judicial estoppel is an equitable doctrine, and the decision whether to invoke it within the court's discretion, we review for abuse of discretion the bankruptcy court's rejection of the doctrine. *See, e.g., Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir.1996).

"[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction", because "[a] district court by definition abuses its discretion when it makes an error of law". *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). Accordingly, "[t]he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions". *Id. See also Latvian Shipping Co. v. Baltic Shipping Co.*, 99 F.3d 690, 692 (5th Cir.1996) ("We will not find an abuse of discretion unless the district court's factual findings are clearly erroneous or incorrect legal standards were applied"); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 535 (5th Cir.1996)

(court "abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

Because judicial estoppel was raised in the context of a bankruptcy case, involving Coastal's express duty under the Bankruptcy Code to disclose its assets, we apply federal law. *See Johnson v. Oregon Dept. of Human Resources*, 141 F.3d 1361, 1364 (9th Cir.1998) (action under Americans with Disabilities Act; "[f]ederal law governs the application of judicial estoppel in federal courts").

Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position". *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988).[1] The purpose of the doctrine is "to protect the integrity of the judicial process", by "prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest". *Id.* (internal quotation

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[1] *See also Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed.Cir.1996) ("The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed"); *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472-73 (6th Cir.1988) (internal quotation marks and citations omitted) ("Courts have used a variety of metaphors to describe the doctrine, characterizing it as a rule against playing fast and loose with the courts, blowing hot and cold as the occasion demands, or having one's cake and eating it too. Emerson's dictum that a foolish consistency is the hobgoblin of little minds cuts no ice in this context").

marks, parentheses, and citation omitted).[2] Because the doctrine is intended to protect the judicial system, *rather than the litigants,* detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary. *See Matter of Cassidy,* 892 F.2d 637, 641 & n. 2 (7th Cir.), *cert. denied,* 498 U.S. 812, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990).[3]

"The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to

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[2] *See also United States v. McCaskey,* 9 F.3d 368, 379 (5th Cir.1993) (purpose of doctrine is "to protect the integrity of the judicial process and to prevent unfair and manipulative use of the court system by litigants"), *cert. denied,* 511 U.S. 1042, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994); *McNemar v. Disney Store, Inc.,* 91 F.3d 610, 616 (3d Cir.1996) ("The doctrine of judicial estoppel serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts."), *cert. denied,* 519 U.S. 1115, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997); *Matter of Cassidy,* 892 F.2d 637, 641 (7th Cir.), *cert. denied,* 498 U.S. 812, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process"); *Reynolds,* 861 F.2d at 472 (internal quotation marks and citation omitted) ("The purpose of the doctrine is to protect the courts from the perversion of judicial machinery").

[3] *See also McNemar,* 91 F.3d at 617 (rejecting contention that party seeking estoppel must show that it would be prejudiced unless opponent is estopped); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,* 81 F.3d 355, 360 (3d Cir.1996) ("While privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required"); *Data General,* 78 F.3d at 1565; *Fleck v. KDI Sylvan Pools, Inc.,* 981 F.2d 107, 121-22 (3d Cir.1992), *cert. denied,* 507 U.S. 1005, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993).

the exigencies of the moment." *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993). The doctrine is generally applied where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice". *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir.1953).[4]

Most courts have identified at least two limitations on the application of the doctrine: (1) it may be applied only where the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party must have convinced the court to accept that previous position. *See United States for use of American Bank v. C.I.T. Construction Inc. of Tex.*, 944 F.2d 253, 258 (5th Cir.1991) ("The 'judicial acceptance' requirement minimizes the danger of a party contradicting a court's determination based on the party's prior position and, thus, mitigates the corresponding threat to judicial integrity");

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[4] *See also Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir.1998) (internal quotation marks and citation omitted) ("Judicial estoppel is applied to the calculated assertion of divergent sworn positions . . . and is designed to prevent parties from making a mockery of justice by inconsistent pleadings"); *Ryan*, 81 F.3d at 358 ("The basic principle . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895).

Matter of Cassidy, 892 F.2d at 641; *Folio v. City of Clarksburg, W.V.*, 134 F.3d 1211, 1217-18 (4th Cir.1998).[5]

The Sixth Circuit has explained that the "judicial acceptance" requirement "does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits. Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition". *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir.1988).

Some courts have imposed additional requirements. For example, the Fourth Circuit holds that the position must be one of fact instead of law. *Folio*, 134 F.3d at 1217-18. *Contra, Matter of Cassidy*, 892 F.2d at 642 ("the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact").

And, many courts have imposed the additional requirement that the party to be estopped must have acted intentionally, *not* inadvertently. *E.g., Johnson*, 141 F.3d at 1369 ("If incompatible positions are based not on

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[5] *Cf. McNemar*, 91 F.3d at 617 (rejecting contention that party seeking estoppel must show that prior statement was accepted by a judicial tribunal); *Ryan*, 81 F.3d at 361 (doctrine of judicial estoppel contains no requirement that "a party must have benefitted from her prior position in order to be judicially estopped from subsequently asserting an inconsistent one"; but, obviously, "threat to the integrity of the judicial process from subsequent assertion of an incompatible position is more immediate" when tribunal has acted in reliance on party's initial assertion).

chicanery, but only on inadvertence or mistake, judicial estoppel does not apply"); *Folio*, 134 F.3d at 1217-18; *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir.1996) (internal quotation marks and citation omitted) (part of threshold inquiry for application of judicial estoppel is whether party to be estopped "assert[ed] either or both of the inconsistent positions in bad faith-*i.e.*, with intent to play fast and loose with the court"); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358, 362 (3d Cir.1996) (internal quotation marks and citation omitted) (judicial estoppel doctrine "not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts"; doctrine "does not apply when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court"; inconsistency "must be attributable to intentional wrongdoing"); *Matter of Cassidy*, 892 F.2d at 642 (judicial estoppel should not be applied "where it would work an injustice, such as where the former position was the product of inadvertence or mistake"); *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir.1973) (applying Texas law on judicial estoppel; "the rule looks toward cold manipulation and not an unthinking or confused blunder").

Browning maintains that, because of the nondisclosure in Coastal's bankruptcy schedules and its lift-stay stipulation, plaintiffs, as Coastal's successors, are judicially estopped (except for the tortious interference claim).

Despite the undisputed facts that Coastal was aware of, but did not disclose, the claims, the bankruptcy court

rejected judicial estoppel, stating that, from the inception of Coastal's adversary proceeding, Browning, the Trustee, and Westinghouse were aware of that action. That statement, however, is in the section of the opinion addressing *equitable estoppel* (which, of course, requires detrimental reliance; that defense is no longer at issue). Because the nondisclosure is not discussed in the part on judicial estoppel, it is unclear whether, in rejecting such estoppel, the court relied on the parties' awareness of the adversary proceeding.

With respect to the lift-stay stipulation, the bankruptcy court noted that it was prepared by Westinghouse's attorneys and reviewed by Coastal's attorney, who "checked it with his client for accuracy" when it was signed. The court stated that Westinghouse and Coastal's attorneys "overlooked" the adversary proceeding in arriving at the $20,000 figure for Coastal's general intangibles; but ruled that it was not their "intent to omit mention of the Browning lawsuit"; and concluded that "[s]uch omission appears to have been inadvertent, as opposed to any outright conspiracy, or intentional self-contradiction being used as a means to obtain unfair advantage". In this regard, the court concluded that the lift-stay stipulation was not intended to be an "exhaustive listing of assets".

The bankruptcy court found that when the stipulation was signed and the stay lifted, Duke, Coastal's CEO and later IC's, believed that Browning's actions had damaged Coastal in the $10 million range. The bankruptcy court stated that "[i]t appears that such lawsuit did have value, but such value did not approach the projected

deficiency of approximately $5 million that [Westinghouse] anticipated would exist after" it sold Coastal's assets.

Accordingly, the bankruptcy court held that Coastal's tort claims were not foreclosed upon and were not affected by judicial estoppel. Likewise, the court concluded that there was "insufficient factual or legal justification to show that [IC] should be judicially estopped . . . from asserting . . . contract claims of Coastal . . . [greater than] $20,000 "; and that there was insufficient proof that Coastal, IC, or Westinghouse participated in a fraud on the court or creditors with respect to listing assets on Coastal's schedules, the lift-stay stipulation, or lifting the stay.

On appeal, the district court summarily "agree[d] with the Bankruptcy Court's findings [, especially concerning inadvertence,] and [held] that judicial estoppel should not be applied".

It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*. 11 U.S.C. § 521(1) ("The debtor shall-(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs"). "The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action". *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F.Supp. 859, 867 (E.D.Tex.1996). " 'The debtor need not know all the facts or even the legal basis

for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed' ". *Id.* (brackets omitted; quoting *Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Indus., Inc.)*, 183 B.R. 812, 821 n. 17 (Bankr.N.D.Ill.1995)). *"Any claim with potential must be disclosed,* even if it is 'contingent, dependent, or conditional' ". *Id.* (quoting *Westland Oil Dev. Corp. v. MCorp Management Solutions, Inc.*, 157 B.R. 100, 103 (S.D.Tex.1993)) (emphasis added).

Viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized. *See generally Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414 (3d Cir.) (discussing importance of disclosure to creditors and to bankruptcy court), *cert. denied,* 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988).

> The rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets.* The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis,*

> *are impaired when the disclosure provided by the debtor is incomplete.*

Rosenshein v. Kleban, 918 F.Supp. 98, 104 (S.D.N.Y.1996) (emphasis added).[6]

As Coastal's bankruptcy attorney admitted at the July 1993 bankruptcy court hearing, it is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information upon which all creditors rely. The significance of the undisclosed claims was underscored by the testimony of Westinghouse's counsel at that same hearing. When asked why the claims against Browning were not included with the assets described in the lift-stay stipulation, he testified that it was not intended to be an exhaustive list of Coastal's assets; that, in order to determine Coastal's assets, creditors should have looked instead at, *inter alia*, Coastal's schedules and statement of financial affairs. (Of course, such claims/assets were not there disclosed.)

Courts in numerous cases have precluded debtors or former debtors from pursuing claims about which the debtors had knowledge, but did not disclose, during the

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[6] *See also Ryan*, 81 F.3d at 362 ("disclosure requirements are crucial to the effective functioning of the federal bankruptcy system"); *Louden v. Federal Land Bank of Louisville (In re Louden)*, 106 B.R. 109, 112 (Bankr.E.D.Ky.1989) ("[w]ithout . . . disclosure [required by 11 U.S.C. § 521], the basic system of marshalling of assets and the resulting distribution of proceeds to creditors would be an impossible task").

debtors' bankruptcy proceedings. *See, e.g., Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931, 114 S.Ct. 344, 126 L.Ed.2d 309 (1993); *Oneida*, 848 F.2d 414.[7] It is along this

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[7] *See also Chandler v. Samford University*, 35 F.Supp.2d 861 (N.D.Ala.1999); *Youngblood Group*, 932 F.Supp. 859; *Rosenshein*, 918 F.Supp. 98; *Okan's Foods, Inc. v. Windsor Associates Ltd. Partnership (In re Okan's Foods, Inc.)*, 217 B.R. 739 (Bankr.E.D.Pa.1998); *Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224 (D.Mass.1996); *Freedom Ford, Inc. v. Sun Bank & Trust Co. (Matter of Freedom Ford)*, 140 B.R. 585 (Bankr.M.D.Fla.1992); *State of Ohio, Dept. of Taxation v. H.R.P. Auto Center, Inc. (In re H.R.P. Auto Center, Inc.)*, 130 B.R. 247 (Bankr.N.D.Ohio 1991); *Sure-Snap Corp. v. Bradford Nat'l Bank*, 128 B.R. 885 (D.Vt.), *aff'd*, 948 F.2d 869 (2d Cir.1991); *Pako Corp. v. Citytrust*, 109 B.R. 368 (D.Minn.1989); *Louden*, 106 B.R. 109; *Hoffman v. First Nat'l Bank of Akron, IA (In re Hoffman)*, 99 B.R. 929 (N.D.Iowa 1989); *Galerie Des Monnaies of Geneva v. Deutsche Bank, A.G. (In re Galerie Des Monnaies of Geneva, Ltd.)*, 55 B.R. 253 (Bankr.S.D.N.Y.1985), *aff'd*, 62 B.R. 224 (S.D.N.Y.1986). *Cf. Donaldson v. Bernstein*, 104 F.3d 547 (3d Cir.1997) (debtors' principals judicially estopped from asserting that one of them had terminated relationship with debtor because debtor did not disclose alleged resignation prior to bankruptcy court's approval of plan of reorganization); *Cullen Center Bank & Trust v. Hensley (Matter of Criswell)*, 102 F.3d 1411 (5th Cir.1997) (Chapter 7 trustee judicially estopped from asserting that creditor was not transferee of oil and gas properties that debtor fraudulently conveyed to children, because trustee succeeded in preference action based on assertion that creditor's lien was a transfer); *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir.1992) (res judicata effect of order confirming plan of reorganization barred debtors from asserting undisclosed claims); *County Fuel Co., Inc. v. Equitable Bank Corp.*, 832 F.2d 290 (4th Cir.1987) (debtor's failure to assert breach of contract counterclaim to proof of claim filed by creditor barred subsequent breach of contract action against creditor based on "principles of waiver closely related to those that, in the interests of repose and integrity, underlie res judicata"); *United*

line that Browning takes its stand. It maintains that the bankruptcy court applied an incorrect standard of law and, therefore, abused its discretion; that, rather than basing its decision on lack of knowledge *vel non*, the court improperly based it on self-serving claims of lack of intent to conceal. Browning maintains that "inadvertence" should preclude judicial estoppel only when the inconsistent positions result from a lack of knowledge. We need not agree entirely with Browning's contention, in order to conclude, as discussed below, that the bankruptcy court abused its discretion.

1.

Plaintiffs respond that the first judicial estoppel prong (inconsistent positions) is not satisfied, because Coastal fulfilled its duty to disclose its claims against Browning by initiating the adversary proceeding in April 1986, a week after filing its Chapter 11 petition. According to plaintiffs, the subsequent nondisclosure was inconsequential because, in the light of the adversary proceeding, everyone involved in the bankruptcy proceeding, including Browning, was aware of the claims.

a.

The record contradicts that assertion; Browning, Westinghouse, and Coastal's bankruptcy counsel all

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Virginia Bank/Seaboard Nat'l v. B.F. Saul Real Estate Investment Trust, 641 F.2d 185 (4th Cir.1981) (creditor judicially estopped from litigating issue based on earlier inconsistent position in bankruptcy proceedings).

believed that, after Browning returned the inventory in May 1986, little remained of the adversary proceeding. Coastal's bankruptcy attorney testified at the July 1993 bankruptcy court hearing that the primary purpose of the adversary proceeding was to cause that inventory return. The attorney who represented Westinghouse in connection with lifting the stay testified similarly that Coastal's claims against Browning were not mentioned in the lift-stay stipulation, during the lift-stay hearing, in the notice of the auction, or at the auction because Westinghouse believed that the claims sought inventory turnover from Browning, which had already been accomplished; and that there was little left to be done in that adversary proceeding. Likewise, at a bankruptcy hearing in January 1994, Browning's attorney testified that inventory turnover was the essence of the adversary proceeding.

In the light of that consensus, it was particularly important for Duke (Coastal) to disclose his vastly different view: that the claims were worth millions. In sum, this silence led Browning, the other creditors, and the bankruptcy court to believe that Coastal's claims against Browning were resolved in May 1986, when it returned the inventory.

b.

Moreover, *Browning's knowledge of the claims,* or its non-reliance on the nondisclosure, even if supported by the record, are irrelevant. As discussed *supra,* unlike the well-known reliance element for other forms of estoppel, such as equitable estoppel, detrimental reliance by the party seeking *judicial estoppel* is *not* required. Again, the

purpose of *judicial estoppel* is *not* to protect the litigants; it is to protect the integrity of the judicial system.[8]

Accordingly, the inconsistent positions prong for judicial estoppel is satisfied. By omitting the claims from its schedules and stipulation, Coastal represented that none existed. Likewise, in scheduling its debt to Browning, Coastal did *not* specify that it was disputed, contingent, or subject to setoff. But in this proceeding, plaintiffs have asserted claims for $10 million against Browning for allegedly causing Coastal's bankruptcy and demise.

2.

Plaintiffs do not seriously dispute that the second prong for judicial estoppel (acceptance of Coastal's first position by the bankruptcy court) is satisfied. The stay was lifted based in part on the stipulation, which represented that Coastal's intangible assets were worth less than $20,000; and that its assets were inadequate to satisfy its debt to Westinghouse.

3.

Nevertheless, plaintiffs maintain that judicial estoppel is inapplicable because the nondisclosure was unintentional and inadvertent. On this record, plaintiffs' and

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[8] Even if detrimental reliance were an element, there is evidence that Browning relied on the no-claims-existed representations in withdrawing its objection to lifting the stay and in not bidding at the auction on Coastal's intangible assets.

the bankruptcy court's reliance on inadvertence to preclude judicial estoppel is misplaced. Therefore, the court abused its discretion.

Our review of the jurisprudence convinces us that, in considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is "inadvertent" only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.[9]

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[9] *See, e.g., Brassfield v. Jack McLendon Furniture, Inc.*, 953 F.Supp. 1424 (M.D.Ala.1996) (in Chapter 7 case, where claims accrued after filing petition, and where debtor was *not* aware of claims during bankruptcy, debtor not judicially estopped from asserting unscheduled claims); *Dawson v. J.G. Wentworth & Co., Inc.*, 946 F.Supp. 394 (E.D.Pa.1996) (although debtor disclosed claim in amended bankruptcy schedules, fact issue regarding debtors' good or bad faith in not disclosing claims in original bankruptcy schedules precluded summary judgment based on judicial estoppel); *Richardson v. United Parcel Serv.*, 195 B.R. 737 (E.D.Mo.1996) (judicial estoppel inapplicable for undisclosed claim where debtor's bankruptcy case was still pending, assets had not been distributed, and no plan had been confirmed); *In re Envirodyne Industries, Inc.*, 183 B.R. 812 (where retention of jurisdiction in plan of reorganization put creditors on notice as to possibility of such actions, and debtor's undisclosed counterclaim did *not* assert position contrary to listing of creditor's claim as undisputed, judicial estoppel did not bar debtor from pursuing counterclaim and setoff request); *Elliott v. ITT Corp.*, 150 B.R. 36 (N.D.Ill.1992) (where debtor was unaware that claim against creditor existed, and amended schedule after discovery of potential claims, judicial estoppel inapplicable); *Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co. (In re Neptune World Wide Moving, Inc.)*, 111 B.R. 457 (Bankr.S.D.N.Y.1990) (fact issue regarding debtor's contention that defendants concealed and altered documents which prevented debtor from discovering and disclosing preferential

Two cases from the Third Circuit aptly illustrate the critical distinction between nondisclosures based on a lack of knowledge, and those where, as here, the debtor fails to satisfy its disclosure duty despite knowledge of the undisclosed facts. In *Oneida*, 848 F.2d 414, judicial estoppel barred a former Chapter 11 debtor from prosecuting against a bank claims not disclosed during the bankruptcy proceedings. The excuse for nondisclosure was *not* lack of knowledge; instead, that the bankruptcy case was never in a procedural posture for the claims to be properly asserted. *Id.* at 418. Although the court stopped short of holding that the nondisclosure was equivalent to taking a position that the claims did not exist, it concluded that the debtor's acknowledgment of its debt to the bank, without any indication that the debt was disputed or subject to setoff (as is the situation here), constituted a position inconsistent with its later action against the bank. *Id.* at 419.

On the other hand, in *Ryan*, 81 F.3d 355, the Third Circuit concluded that a Chapter 11 debtor's earlier nondisclosure would not judicially estop the debtor from pursuing the claims outside of bankruptcy, because there was no evidence that the debtor acted in bad faith. *Id.* at 362. The debtor, a builder, asserted claims against the manufacturers and suppliers of an allegedly defective product; but it had not listed any potential claims regarding the product in its bankruptcy schedules.

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or fraudulent transfer claims in disclosure statement precludes dismissal based on judicial estoppel).

The court distinguished *Oneida* on the ground that the debtor there not only failed to disclose its potential claim as a contingent asset, but also scheduled its debt as a liability, without disclosing an offset possibility. *Id.* at 363. The court stated that the *Oneida* debtor had knowledge of its claim when it filed for bankruptcy because the "gravamen of [its] case against the bank was that the bank's actions were responsible for forcing [the debtor] into bankruptcy", *id.*; and noted that the *Oneida* debtor had a motive to conceal the claim because, had the bank known that the debtor would seek restitution of the amount paid to the bank under the plan, the bank "might well have voted against approval of the plan". *Id.* The *Ryan* court concluded that, in *Oneida*, it was "[t]his combination of knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose [that] gave rise to an inference of intent sufficient to satisfy the [bad faith] requirements of judicial estoppel". *Id.* at 363.

In contrast, the court stated that there was no basis for inferring that the *Ryan* debtor "deliberately asserted inconsistent positions in order to gain advantage", *id.* at 363, because there was "no evidence that the nondisclosure played any role in the confirmation of the plan or that disclosure of the potential claims would have led to a different result", *id.*; and the debtor's failure to list claims against the manufacturers and suppliers as contingent assets was offset by its failure to list, as contingent liabilities, claims asserted against the debtor by homeowners for the defective product. *Id.* The court also noted that the debtor would derive no appreciable benefit from the nondisclosure, because creditors would receive 91 percent of any recovery on the claims, *id.*; and that the

debtor's actions subsequent to filing its schedules, including obtaining authorization from the bankruptcy court to pursue the claims, were inconsistent with an intent to deliberately conceal them. *Id.* at 364. The court concluded that intent to mislead or deceive could not be inferred from the mere fact of nondisclosure. *Id.* at 364-65.

In *Okan's Foods, Inc. v. Windsor Associates Ltd. Partnership (In re Okan's Foods, Inc.)*, 217 B.R. 739 (Bankr. E.D.Pa.1998), the bankruptcy court held that the "bad faith" element mandated by *Ryan* was satisfied by "[s]tatements or conduct of the debtor evincing a reckless disregard for the truth". *Id.* at 755. There, a Chapter 11 debtor, following plan confirmation, filed an adversary complaint against its creditor-landlord, asserting claims under 42 U.S.C. § 1983, and alleging that the creditor's actions caused its bankruptcy. The court found that, because "the undisclosed claim involved allegations that a particular creditor's conduct precipitated the filing of the bankruptcy case and that substantial damage to its business occurred as a result . . . , all of the facts underlying the claims were available and known to the debtor well before confirmation", *id.* at 756, and inferred that the debtor's motive for the pre-confirmation nondisclosure was "to preserve for its own uses, to the exclusion of its creditors, any recovery it might obtain upon a successful prosecution of such claim". *Id.*

Coastal's claimed "inadvertence" is not the type that precludes judicial estoppel against plaintiffs, as Coastal's successors, from asserting in the instant litigation the previously nondisclosed claims; Coastal both knew of the facts giving rise to its inconsistent positions, *and* had a motive to conceal the claims.

It is undisputed that Duke, who, as Coastal's CEO, signed Coastal's schedules, then believed that Coastal had claims for $10 million against Browning. And, as found by the bankruptcy court, he continued to maintain that belief when he authorized Coastal's attorney to execute the lift-stay stipulation. At the July 1993 bankruptcy hearing, when asked why he did not disclose those claims on Coastal's schedules, Duke responded that "[w]e pretty much relied on our attorneys. We had no experience in filling those out, and we provided them the information, and maybe later on during the process, . . . a couple of months down the road we may have filled them out ourselves. . . . We went to [a] library and tried to find books on how to fill these forms out. . . . " He testified further: "[W]e had never done these kind of statements before, and we depended upon our legal counsel . . . about these types of things, and he had kind of a check list for us. . . . [W]e depended upon [him] to give us the guidance on what to put. . . . " Finally, Duke testified that he did not know what "contingent" and "unliquidated" claims meant under bankruptcy law; that Coastal's counsel told him "what to put" on the schedules; that it was counsel's conclusion that "there was no value" in the claims against Browning; and that, if there was an error, it was "just an oversight".

But, at that July 1993 hearing, Coastal's bankruptcy attorney testified that the adversary proceeding against Browning was a contingent or unliquidated claim that should have been included on Coastal's schedules; and conceded that Coastal's debt to Browning "probably" should have been listed as being disputed. Although the attorney testified that it was his firm's policy to discuss

schedules with clients, he did not recall his specific involvement in preparing the schedules, could *not* recall any discussions with Young or Duke about the claims against Browning, and could *not* testify as to why the adversary proceeding was *not* listed as a contingent or unliquidated claim.

Duke's claimed lack of awareness of Coastal's statutory disclosure duty for its claims against Browning is not relevant. *See Chandler v. Samford University,* 35 F.Supp.2d 861, 865 (N.D.Ala.1999) ("Research reveals no case in which a court accepted such an excuse for a party's failure to comply with the requirement of full disclosure"). In any event, no one testified that Coastal's bankruptcy attorney advised Coastal *not* to disclose the claims.

Moreover, Coastal had a motive for concealing them. Had those claims, believed to be worth $10 million (more than enough to satisfy Coastal's debt to Westinghouse) been disclosed, Coastal's unsecured creditors might have opposed lifting the stay, and the bankruptcy court might have reached a different decision in that regard. Or, even had the stay been lifted, creditors, including Browning, might have chosen to bid more at the foreclosure auction for Coastal's assets. Browning's representative at the auction testified that, had Browning been aware that Coastal's claims against it were then being sold, he "strongly suspect[ed]" that Browning would have authorized him to bid on them.

Coastal avoided paying its debts by filing bankruptcy. Yet IC, formed by Coastal's CEO, purchased Coastal's assets, including the undisclosed $10 million

claim against Browning, for only $1.24 million, and continued to sell Browning's former inventory at discounted prices, then obtained a net judgment of $3.6 million against Browning on the undisclosed claims. For facts similar to those at hand, the bankruptcy court's interpretation of the "inadvertence" exception for judicial estoppel would encourage bankruptcy debtors to conceal claims, write off debts, purchase debtor assets at bargain prices, and then sue on undisclosed claims and possibly recover windfalls. This, of course, would be to the detriment of creditors who decided not to bid on the debtor's assets at a foreclosure sale because they lacked knowledge about the existence or value of the undisclosed claims.

Needless to say, judicial estoppel is intended to prevent just such a process. As the First Circuit aptly stated in *Payless*:

> The basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in [debtor's] present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively. [Debtor], having obtained judicial relief on the representation that no claims existed, can not now resurrect them and obtain relief on the opposite basis.

989 F.2d at 571.

4.

Finally, plaintiffs maintain that judicial estoppel would be inequitable because Browning also took inconsistent positions on issues related to its defense (regarding ownership of the claims and whether they were foreclosed on by Westinghouse). We disagree. Again, the purpose of judicial estoppel is to protect the integrity of courts, not to punish adversaries or to protect litigants.

B.

As noted, the only claim not barred by judicial estoppel is that for tortious interference. Plaintiffs claimed that, around the start of 1986, and but for Browning's interference, Walter Helms would have purchased Coastal for $10 million. Helms testified that Browning's president, Kooyman, told him (Helms) that he had heard Helms was interested in purchasing Coastal; Helms confirmed that he intended to do so; and Kooyman told Helms that "he couldn't divulge certain things that were going on, but it probably would be a good idea if [Helms] held up a little bit".

Browning presents, *inter alia*, a meritorious limitations bar.

1.

Although Coastal raised tortious interference claims against Browning in its original complaint (filed in 1986), and IC did likewise in several of its amended complaints, those claims were premised on Browning's failure to return inventory and its impact on Coastal's relationships

with its customers and secured lender (Westinghouse). It was *not* until late December 1993, over seven years after the adversary proceeding was filed, that IC moved for leave to file a fifth amended complaint which, *for the first time,* claimed tortious interference based on the alleged Helms-purchase. That amended complaint was not filed until almost two years later, in 1995. And, plaintiffs subsequently restricted their tortious interference claim to the Helms-purchase.

Under Texas law, a two-year limitations period applies to tortious interference claims, TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(a); *First Nat'l Bank of Eagle Pass v. Levine,* 721 S.W.2d 287, 289 (Tex.1986); and, "[f]or the purposes of application of the statute of limitations, a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy. . . . Put another way, a cause of action can generally be said to accrue when the wrongful act effects an injury". *Murray v. San Jacinto Agency, Inc.,* 800 S.W.2d 826, 828 (Tex.1990) (internal quotation marks and citation omitted); *see also Computer Associates Int'l, Inc. v. Altai, Inc.,* 918 S.W.2d 453, 458 (Tex.1996) ("The traditional rule in Texas is that a cause of action accrues and the two-year limitations period begins to run as soon as the owner suffers some injury, regardless of when the injury becomes discoverable"). On the other hand, "[t]he discovery rule exception defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action". *Id.* at 455.

But, the Texas Supreme Court has stated that "[t]he discovery rule, in application, proves to be a very limited

exception to statutes of limitations". *Id.* at 455 (internal quotation marks and citation omitted); *see also S.V. v. R.V.*, 933 S.W.2d 1, 25 (Tex.1996) ("exceptions to the legal injury rule should be few and narrowly drawn"). "Generally, application [of the discovery rule] has been permitted in those cases where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable". *Altai*, 918 S.W.2d at 456 (internal quotation marks and citation omitted).

In seeking judgment as a matter of law, Browning asserted that the interference claim was time-barred. Plaintiffs had to prove applicability of the discovery rule: first, that tortious interference claims are inherently undiscoverable; and second, that their claim is objectively verifiable. *See Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex.1988).

a.

Browning contends that the claim is not inherently undiscoverable because the alleged injury is not, by its nature, unlikely to be discovered within the limitations period. Along this line, Browning maintains that Coastal became aware of its injury when the alleged sale did not materialize; and that, by simply asking Helms, the putative purchaser, Coastal could have discovered the alleged interference.

Plaintiffs counter that the claim was inherently undiscoverable because of the difficulty of learning about secret communications between third parties. They point out that Young, Coastal's former president and chairman, testified that he asked Helms why he wanted to delay

purchasing Coastal, and that Helms refused to explain until his January 1993 deposition. Duke testified similarly that, until January 1993, Helms never mentioned why he did not complete the purchase.

"The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances where it is difficult for the injured party to learn of the negligent act or omission". *Altai,* 918 S.W.2d at 456 (internal quotation marks and citation omitted). "Inherently undiscoverable encompasses the requirement that the existence of the injury is not ordinarily discoverable, even though due diligence has been used". *Id.* The Texas Supreme Court has stated that "[t]he common thread in [the 'inherently undiscoverable'] cases is that when the wrong and injury were unknown to the plaintiff because of their very nature and not because of any fault of the plaintiff, accrual of the cause of action was delayed". *S.V.,* 933 S.W.2d at 7.

"To be 'inherently undiscoverable,' an injury need not be absolutely impossible to discover, else suit would never be filed and the question whether to apply the discovery rule would never arise." *Id.* "Nor does 'inherently undiscoverable' mean merely that a particular plaintiff did not discover his injury within the prescribed period of limitations; discovery of a particular injury is dependent not solely on the nature of the injury but on the circumstances in which it occurred and plaintiff's diligence as well". *Id.* "An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence". *Id.*

Helms was listed in October 1989 as an expert witness for plaintiffs, and so testified. There was also evidence that he was a director of IC's parent, Overline Corporation; that he had been paid $50,000 annually as a consultant for Overline; that he had owned ten percent of its stock; and that he was a creditor of IC. Under these circumstances, Helms' failure until his deposition in January 1993 to inform plaintiffs of Browning's alleged interference is inexplicable.

We doubt that tortious interference is the type of conduct that, *by its nature*, is unlikely, despite due diligence, to be discovered within the limitations period. In any event, it is not necessary for us to decide that question. The discovery rule is inapplicable because, as discussed below, the claim is not objectively verifiable.

b.

Browning asserts that the claim is not objectively verifiable because there is no objective or documentary evidence of either Helms' alleged offer or Browning's alleged interference. Plaintiffs respond, based on Helms' eyewitness account, that the claim is objectively verifiable.

The Texas Supreme Court has stated that "the bar of limitations cannot be lowered for no other reason than a swearing match between parties over facts and between experts over opinions". *S.V.*, 933 S.W.2d at 15. The requirement of objective verifiability requires physical or other evidence, such as an objective eyewitness account, to corroborate the existence of the claim. *See S.V.*, 933 S.W.2d at 15. "Objectively verifiable evidence is the key

factor for determining the discovery rule's applicability." *Askanase v. Fatjo*, 130 F.3d 657, 668 (5th Cir.1997).

There is no documentary evidence of Helms' proposed purchase or Kooyman's alleged comment regarding it. The only evidence concerning Helms' alleged agreement to purchase Coastal is his and Young's testimony; the only evidence concerning interference is Helms' testimony. Kooyman, Browning's president, did *not* testify at trial; his testimony was presented by deposition. And, he was *not* deposed about his alleged interference – his alleged comments to Helms.

As stated, Helms testified as a paid expert witness for plaintiffs, was a creditor of IC, and was a consultant, part owner, and director of IC's parent. He also had other close ties to the Coastal and IC principals: at the time of Helms' testimony, Young was running a company for Helms; and both Young and Duke had served as expert witnesses for Helms in prior litigation involving one of Helms' companies.

2.

Because the discovery rule does not apply to the interference claim, it is time-barred unless it relates back to the complaints filed within the limitations period. Rule 15(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . .

FED. R. CIV. P. 15(c).

"[U]nder Rule 15(c), an amendment to a complaint will relate back to the date of the original complaint if the claim asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading". *F.D.I.C. v. Conner*, 20 F.3d 1376, 1385 (5th Cir.1994) (internal quotation marks and citation omitted).

> The theory that animates this rule is that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading. Permitting such an augmentation or rectification of claims that have been asserted before the limitations period has run does not offend the purpose of a statute of limitations, which is simply to prevent the assertion of stale claims.

Id. (internal quotation marks and citation omitted).

Browning notes that the tortious interference claim is based on a different transaction than the earlier claims, which are based on Browning's failure to return inventory to Coastal. Plaintiffs counter that the relation-back doctrine applies because Browning had ample notice, after more than seven years of litigation, that plaintiffs

were suing on all of Browning's acts that caused Coastal's demise; and that Browning's proposed-purchase interference was merely part of its broader plan to destroy Coastal.

We conclude that the claim does not arise out of the same conduct, transaction, or occurrences presented in the timely-filed complaints. As the district court stated in its post-verdict order:

> All of the claims asserted by plaintiffs revolve around two sets of occurrences. The tortious interference . . . claim stems from an attempted sale of Coastal Plains to a third party. . . . The remaining claims involve the failure of Browning to return inventory to Coastal Plains.

And, in awarding attorney's fees, the district court stated that "[t]he tortious interference claim is not factually interrelated to the other claims as it arose from a separate transaction".

Moreover, plaintiffs' contention that their tortious interference claim is based on the same transaction or occurrence as their other claims is not consistent with positions they have taken with respect to attorney's fees and Browning's right to setoff. In seeking attorney's fees, one of plaintiffs' attorneys stated by affidavit: "*[w]ith the exception of the claim involving tortious interference*, all of the causes of action pled in this case were dependent upon the same set of facts or circumstances". (Emphasis added.) In their appellate brief here, plaintiffs contend that Browning's tortious interference caused a separate injury to Coastal; and assert that, if we affirm the judgment solely on the basis of the interference claim, Browning will not be entitled to a setoff because "[t]ortious

interference is not sufficiently connected with Browning's claim to permit an offset".

III.

For the foregoing reasons, the judgment is *REVERSED,* and judgment is *RENDERED* in favor of Browning.

REVERSED and RENDERED

APPENDIX B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
COASTAL PLAINS, INC.	§	Case No. 386-31299
	§	RCM-11
Debtor	§	

INDUSTRIAL CLEARINGHOUSE, INC., Successor in interest to Coastal Plains, Inc.	§	
Plaintiff	§	
VS.	§	Adversary No. 386-3347
BROWNING MANUFACTURING, formerly a division of Emerson Electric Company, Emerson Power Transmission Corporation	§	(Filed May 18, 1994)
Defendant	§	

AMENDED MEMORANDUM OPINION

Procedural History

This matter was heard July 15, October 13, 1993, and January 24, 1994. This Court permitted the intervention of

Duke Salisbury (the "Trustee"), Trustee of Coastal Plains, Inc. ("Coastal" or "Debtor"), as a party in interest in this adversary. Industrial Clearinghouse, Inc. ("ICHI") and Browning Manufacturing ("Browning" or "Defendant") Division of Emerson Electric Company, impliedly consented to such intervention so that the Court could address the issues submitted for consideration. Following are the Court's Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7052. This adversary proceeding for turnover and injunction was filed on April 28, 1986 by Coastal against Browning. Various matters occurred thereafter, many of which will be described hereinafter. On January 25, 1989, the District Court withdrew the reference. In a hearing in District Court on May 3, 1993, the District Court vacated its order withdrawing the reference and the case was referred back to the Bankruptcy Court.

As a result of a status conference on June 4, 1993, this Court, on July 2, 1993, entered its order concerning issues to be tried at the foregoing hearings. Those issues, while containing sub-parts, may be succinctly stated as follows:

1. Who is the proper party to prosecute the claims against Browning.

2. Whether ICHI is barred by alleged fraud on the court, estoppel, or *res judicata* from prosecuting any of the complaints in the Fourth Amended Complaint.

Subsequent to the status conference, two additional issues surfaced, *i.e.*, whether ICHI should be permitted to file its Fifth Amended Complaint, and, lastly, whether a settlement between the Debtor's Trustee and ICHI should be approved. ICHI and/or the Trustee will be permitted

to file an amended complaint after this Court signs an order on this opinion. Subsequent to submission of such settlement on January 24, 1994, and before same was ruled upon, the Trustee withdrew his application to approve such a settlement. On February 25, 1994, while this matter was under advisement, the Trustee and ICHI tried to reinstate the alleged settlement. It appeared that the proposed settlement referred to in correspondence on February 25, 1994 contained new terms. Accordingly, the Trustee was given thirty-five days from March 18, 1994 to try the settlement agreement at a three-hour hearing (one and one-half hours each for the Trustee/ICHI and any opponents of the settlement). The motion for approval of settlement agreement was tried April 21, 1994, and taken under advisement.

Jurisdiction

The issues considered herein are core proceedings under 28 U.S.C. 157(b)(2)(A), (E), and (O). Alternatively, the parties consented to this Court's entry of final orders with regard to issues 1 and 2, pursuant to 28 U.S.C. 157(c)(2).

Background

Coastal filed its petition for relief under Chapter 11 on April 21, 1986. The law firm of Jackson & Walker ("J&W") was employed to represent the Debtor in this case.

J&W had a $75,000 retainer, which, apparently, was part of Debtor's authorized use of cash collateral from

Westinghouse Credit Corporation ("WCC") (Defendant's Exhibit ("DX") 82), Debtor's sole secured creditor. WCC never intervened in this adversary proceeding.

Immediately following the filing of its bankruptcy, Coastal filed this adversary action against Browning, seeking, among other things, a turnover of Coastal's inventory, damages for willful violation of the automatic stay, and tortious interference with Coastal's contractual relations (DX 13).

On May 2, 1986, this Court ordered the return of Coastal's inventory from Browning, and found that Browning had violated the automatic stay, but did not address the claims for damages (Plaintiff's Exhibit ("PX") 8).

During the course of the bankruptcy case, Debtor's sole secured creditor, WCC, filed its Motion to Lift Stay so as to allow it to foreclose on its pre- and post-petition (discussed *infra*) security interests in Debtor's assets.

In August 1984, Coastal entered into a $15,000,000 credit facility with WCC.

To secure its obligations under the WCC credit facility, Coastal executed a Collateral Chattel Mortgage (PX 13) in which it mortgaged, affected, and hypothecated the following property to WCC:

> All of Mortgagor's accounts, accounts receivable, other receivables, contract rights, chattel paper, instruments and documents whether now owned or hereafter acquired; all of Mortgagor's goods of whatever kind or nature, wherever located, now owned or hereafter acquired which are held by Mortgagor for sale

> or lease, including all returns, repossessions, substitutions, replacements, parts, additions and assessious [sic] thereto and thereof, and all proceeds thereof; and any personal property of Mortgagor (including things in action) other than goods, accounts, chattel paper, documents, instruments and money, and all proceeds thereof.

See, p.2, ¶ 4, which incorporates Exhibit B to the Collateral Chattel Mortgage. The above-described property is collectively referred to as the "Pre-Petition Collateral".

Coastal also executed a Financing and Security Agreement (PX 12) to secure its obligations under the WCC credit facility. In the Financing and Security Agreement, Coastal granted WCC a security interest in, among other things, its general intangibles, which were defined as "[a]ny personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money, and all proceeds thereof." Financing and Security Agreement, §§ 3 and 1E.

The Promissory Note (PX 11) executed by Coastal as part of the WCC credit facility provided that, upon default, WCC had the right to:

> Lease, sell or otherwise dispose of all or any part of the Collateral, in its then condition or after any further manufacturing or processing thereof, at public or private sale or sales, with such notice as may be required by law (it being agreed by Maker that, in the absence of any contrary requirement of law, five (5) days prior notice of a public or private sale of the Collateral shall be deemed reasonable notice), in lots or in bulk, for cash or on credit, all as WCC, in

> its sole discretion, may deem advisable. Such sales may be adjourned from time to time with or without notice. . . . WCC may purchase all or any party of the Collateral at public or, if permited [sic] by law, private sale and, in lieu of actual payment of such purchase price, may set off the amount of such price against the indebtedness due under this Note.

Promissory Note, p. 4. ¶ 3.

As of April 22, 1986, Coastal owed WCC in excess of $8.5 million (PX 17).

On May 7, 1986, an Agreed Order Providing for Adequate Protection, Post Petition Financing and Authorized Use of Cash Collateral was entered by this Court (the "Post-Petition Financing Order"). (PX 14). The Post-Petition Financing Order provided:

> 2. As adequate protection for the repayment of any indebtedness to Lender [WCC] and for any loss to the Lender [WCC] occasioned by the Debtor's [Coastal's] use of the Collateral, including any attorneys fees on behalf of Lender [WCC] in collection of the Indebtedness, or any associated costs thereof, the Debtors [Coastal] have agreed to and hereby do grant to Lender [WCC], and the Court by this Order now creates and confirms the following priority and lien positions in favor of Lender [WCC]:
>
> A valid and duly perfected security interest in and lien upon all presently owned or hereinafter acquired property, assets, rights and interests of Debtors [Coastal], all real and personal, tangible and intangible property of any kind or nature, except as modified herein

> including accounts, inventory, general intangibles, Cash Collateral, equipment, fixtures, real estate, all claims respecting and rights arising out of avoidable transfers and all property which is recovered or recoverable by the Debtors [Coastal] or any successor trustee, pursuant to any avoiding or recovery powers, including, without limitation, powers rising under Sections 544-545, 547-549, and 553 of the Bankruptcy Code, and under any other law, together with all of the income, profits, proceeds, products, and rents thereof, whether arising before or after the commencement of this case [Coastal's bankruptcy case] (herein sometimes collectively referred to as *'the Post-Petition Collateral'*). . . .

(PX 14 at pp. 4 and 5, ¶ 2). (Emphasis added). The lien granted to WCC in the Post-Petition Financing Order was given the priority provided under 11 U.S.C. § 364(d)(1), subject only to prior liens. (PX 14)

The Post-Petition Financing Order further provided that:

> 6. In the event the Debtors [Coastal] fail to comply with the Loan Documents after May 16, 1986, or the terms of this [Post-Petition Financing] Order, Lender [WCC] in its absolute discretion may give written notice . . . of such non-compliance and Lender [WCC] may elect to make no further advances under the Loan Documents, . . . and withdraw its consent to Debtors' [Coastal's] use of any Cash then advanced (hereinafter called 'Shutdown Notice'). When such notice is given to Debtor [Coastal] and filed with the Court, in the absence of a cure of any non-compliance or the obtaining of a court

> order to the contrary secured within seven (7) working days (that is, days when the Court is not closed) of receipt of such notice, the automatic stay under 362(a) of the Bankruptcy Code shall be lifted and the Debtors [Coastal] will promptly cooperate to effect a transfer to Lender [WCC] of all Collateral, will not oppose any transfer by Lender [WCC] of any funds in the operating account or any other accounts of Debtors [Coastal], and will not thereafter use, spend, sell, or encumber the Cash Collateral or other Collateral.
>
> * * *
>
> . . . the Security interests and mortgage liens granted by the Debtors [Coastal] in the Post-Petition Collateral shall be deemed granted and perfected without the necessity of the execution of filing of any documents otherwise required under applicable law for the granting and perfection of security interests and mortgage liens, with such grant and perfection binding on the Debtors [Coastal], any successor in interest of the Debtors, or any subsequently appointed trustee in this case and in any superceding [sic] case under Chapter 7 of the Code, and creditors who have or may hereafter extend credit to the Debtors [Coastal] or their estates . . .

Id. at pp. 8-10, ¶¶ 6 and 7.

The Post-Petition Financing Order also included stipulations that:

> 2. It is in the best interests of Debtors [Coastal] to use Cash Collateral pursuant to the terms of this [Post Petition Financing] Order since such action will enable these entities to

continue their ongoing operations and will enhance the possibility of a successful reorganization in this case.

3. The authorizations contained in this [Post Petition Financing] Order have been at arms length, are for reasonably equivalent value, are fair and reasonable under the circumstances and enforceable pursuant to their terms.

4. Debtors and Lender [WCC] have acted in good faith in connection with this [Post Petition Financing] Order.

* * *

7. As adequate protection for the repayment of the Indebtedness to Lender [WCC] and for any loss to Lender [WCC] occasioned by Debtor's [Coastal's] use of the Collateral and in consideration of Lender [WCC] making Post[-]Petition financing available to Debtors [Coastal], Debtors [Coastal] agree to convey to Lender [WCC] a security interest in its Post-Petition Collateral . . . [as defined above]. The Pre-Petition Collateral and Post-Petition Collateral . . . shall secure all existing and hereafter incurred Indebtedness to Lender [WCC].

* * *

9. Debtors recognize the validity, priority and enforceability of the Lender's [WCC's] security interests granted in the Loan Documents and in this [Post-Petition Financing] Order.

(PX 14 at pp. 2-4, ¶¶ 2-4, 7 and 9).

The Post-Petition Financing Order was served on Coastal's twenty largest creditors and the U. S. Trustee.

No objections to the Post-Petition Financing Order of May 7, 1986 were made and no appeal from it was ever taken, nor was the record of that 1986 hearing offered into evidence.

Based on the Post-Petition Financing Order, WCC allowed Coastal to continue using its collateral. (PX 17).

On or about September 4, 1986, Coastal was notified that WCC would not advance additional sums pursuant to the Post-Petition Financing Order because Coastal had not maintained its loan balances within the required borrowing base. (PX 16, p. 3).

On September 9, 1986, based on Coastal's alleged violation of the terms of the Post-Petition Financing Order, WCC filed a Motion for Relief from Automatic Stay and Objection to Debtors' Use of Cash Collateral. (PX 16).

As of September 18, 1986, Coastal owed WCC $8,672,192.01, including post petition funding in excess of $691,000. (PX 17).

In connection with its motion to modify, WCC and Coastal submitted a stipulation of facts (PX 17) that included estimates of the value of Coastal's accounts receivable and inventory. The stipulation also indicated that Debtor's general intangibles consist of computer software programs, customer lists and vendor lists and are worth less then $20,000.00. The stipulation showed more than a $5,000,000 shortfall between the property described therein and the amount due WCC.

Although Browning objected to WCC's motion to modify the automatic stay, it withdrew that objection.

(Order Withdrawing Objection, PX 21). Browning had also previously filed an adversary against WCC to make it marshal its assets, which adversary it voluntarily dismissed. (PXs 19 and 22).

On or about September 18, 1986, the Debtor and Westinghouse submitted an Agreed Order Terminating Automatic Stay (PX 23) and filed the Stipulation of Facts (PX 17) in support thereof. The Court entered the Agreed Order September 19, 1986. (PX 23).

Exhibit B to the Order Terminating Automatic Stay reads in part as follows:

> Property of Coastal Plains, Inc. . . . in which Westinghouse Credit Corporation holds a valid, prior, first and perfected security interest and lien pursuant to § 364(d)(1) of the Bankruptcy Code:
>
> A. All fixed assets, including all machinery and equipment, real and personal property leases . . . , licenses, patents, trademarks, copyrights, tradenames, goods, merchandise, materials, furniture, fixtures, vehicles, all other tangible personal property, and all insurance policies relating in whole or in part to the foregoing; and
>
> B. All property, real and personal, tangible and intangible of any kind or nature, including accounts, inventory, general intangibles, cash collateral, equipment, fixtures, real estate, all claims respecting and rights arising out of avoidable transfers and all property which is recovered or recoverable by the

> Debtors or any successor trustees, pursuant to any avoiding or recovery powers, including, without limitation, powers arising under §§ 544-549, and 553 of the Bankruptcy Code, and under any other law, together with all of the income, profits, proceeds, products, and rents thereof, whether arising before or after the commencement of these cases. . . .

Id. (PX 23).

This Court concluded, pursuant to an agreed order, that grounds existed under §§ 362(d)(1) and 362(d)(2) of the Bankruptcy Code to grant WCC relief from the automatic stay and, accordingly, granted such relief. (PX 23, pp. 4 ¶ 1 and 5 ¶ 1). Given the terms of the Post-Petition Financing Order, the Order Terminating Automatic Stay was arguably unnecessary. However, it is obvious that WCC felt that an order lifting the stay was necessary. In the order lifting the stay (PX 23), drafted and agreed to by WCC (PX 23 at p. 4), it is stated:

> 16. Continuation of the Automatic Stay will work real and irreparable harm to WCC and *will deprive WCC* of its right to enforce its security interest and lien in the Property.

Id. (Emphasis added).

On September 26, 1986, WCC gave written notice to Coastal that a public sale would occur on October 7, 1986 at 10:00 a.m. on Coastal's premises at 1208 Viceroy, Dallas, Texas (the "Sale"). The property WCC gave notice it intended to sell at the Sale included "all general intangibles". (Notice of Public Sale of Collateral, PX 24, Exhibit

A). The notice went to all the creditors listed in the bankruptcy. (Transcript ("Tr.") 7/15/93, pp. 278-279).

WCC widely advertised the Sale and a number of bidders attended. The bidders included a representative from Browning. The auctioneer's notice of sale (DX 23) did not include "general intangibles". This notice went to third parties. (Tr. 7/15/93, pp. 278-279).

On October 7, 1986, WCC, through an auctioneer, conducted the sale. WCC was high bidder and paid $3,250,000 for the property by setting off the purchase price against the debt due it from Coastal. At the Sale, Rosen, the auctioneer, orally advised he was selling "computer software and general intangibles, which would include customer lists, vender lists, any other intangible assets of the corporation." (DX 70, p. 26). There was a category bid on this of $2,000. (DX 70, p. 27). Rosen's notes on this (PX 26) show:

10 Computer Hardware only *$4000 #125*

11 Computer Software only *$2000 #125*

& General Intangibles

Also see DX 70. However, WCC bought the property on a bulk bid for the $3,250,000, and Rosen announced the bulk bid was for all lot numbers "as we have outlined: . . . "and general intangibles; office furniture and equipment; and accounts receivables." (DX 70, p. 30).

The Secured Party's Bill of Sale (PX 28) had the same Exhibit A property description as on the Notice of Public Sale of Collateral (PX 24), *i.e.* it contained the words "all general intangibles".

Effective in February 1987, WCC sold some of the property it had purchased at the Sale to ICHI (DXs 39-40 and PXs 43-44), and which purportedly included this suit. ICHI and New Phoenix Corporation were both formed shortly prior to Coastal's bankruptcy being filed, and, since the inception of the case, were represented by J&W, the same firm that represented Debtor.[1]

From the documentation between ICHI and WCC (DXs 39-40, and PXs 43-44), it appears that such parties thought that WCC's rights in the Browning suit had been foreclosed on and sold to ICHI. As WCC's attorney testified: "If I missed something, then I made a mistake. I was supposed to get every single asset locked up in terms of getting the stay lifted and then foreclosing on it." (Tr. 7/15/93, pp. 255 and 274; also see pp. 49, 265-266). After the foreclosure, while not formally appearing as attorneys of record, WCC's attorneys initially controlled the disposition of that litigation. (Tr. 7/15/93, pp. 49-51). Browning's attorneys talked to WCC about dismissal of the lawsuit after the foreclosure. (Tr. 7/15/93, p. 48). WCC pursued the preference claims after the foreclosure. (Tr. 7/15/93, p. 322). Documents between such parties specifically mention such suit; same was included as part of the "remaining" assets of Coastal already foreclosed upon by Browning. WCC's bill of sale transferred to ICHI "all

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[1] J&W failed to disclose its conflicting relationship with ICHI to the Court at any time, through formal pleadings under Bankruptcy Rule 2014, or otherwise. This is especially bothersome in the context of the stay hearing. (*See*, DX 82). J&W's position is not approved, but no relief against J&W was sought in this adversary, and J&W has not had the opportunity to respond by pleadings.

of its right, title and interest, if any, in the remaining assets." However, a transfer of a lien without the debt is ineffective to consummate a transfer to ICHI of the unforeclosed security interest of WCC in the tort claims. *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220, 1225 (5th Cir. 1978); *Texas Bank & Trust Co. of Dallas v. Custom Leasing*, 402 S.W.2d 926, 930 (Tex. Civ. App. – Amarillo 1966, no writ hist.); *Vivier v. Barreda*, 110 S.W.2d 1233, 1235 (Tex. Civ. App. – San Antonio 1937, writ dism'd w.o.j.); 50 Tex Jur 3d, Liens § 10.

In light of the issues before this Court, it is unnecessary to determine whether, at this date, WCC still has a financing order court lien in the Debtor's tort claims against Browning.

On January 28, 1987, Coastal moved to dismiss its chapter 11. (PX 39). This was opposed (PX 40) by the Creditors' Committee (which had mostly been an inactive committee), for the reason that it felt there was insufficient investigation of preferences and fraudulent conveyances.

On April 3, 1987, Coastal's Chapter 11 case was converted to a Chapter 7 case. (PX 41).

The Trustee of Coastal's bankruptcy estate was appointed on May 4, 1987.

On February 5, 1988, the Trustee filed a No-Asset Report and applied to close Coastal's bankruptcy case. (PX 45)

On February 25, 1988, this Court accepted the Trustee's No-Asset Report and closed Coastal's case. (PX 46). However, in March 1988, Coastal's bankruptcy case

was reopened to address issues unrelated to this adversary proceeding.

On April 12, 1988, the law firm of Baker, Mills & Glast moved that it be substituted as counsel for Coastal in this adversary. (DX 55). On April 15, 1988 (DX 56), an order was entered permitting such substitution. Such order was never appealed. The record contains no application by Baker, Mills & Glast to be appointed as counsel for Debtor. Both the motion and order to substitute were signed by Warren Smith of Baker, Mills & Glast as attorneys for Coastal. This was improper, as Baker, Mills & Glast was not attorney for Coastal, and was not eligible to be general counsel for Coastal. 11 U.S.C. § 327(a). Furthermore, Baker, Mills & Glast did not seek employment as special counsel under 11 U.S.C. § 327(e).

On or about April 13, 1988, Warren H. Smith ("Smith"), ICHI's attorney, discussed this adversary proceeding with the Trustee. The conversation between Smith and the Trustee was memorialized in a letter from Smith to the Trustee. The Trustee did not respond in any way to Smith's letter. (PX 47). PX 47, dated April 13, 1988, reads as follows:

> This will confirm our telephone conversation of today concerning the above-captioned adversary action, in which I informed you that our client, Industrial Clearing House, Inc., the assignee of Westinghouse of the above-captioned adversary action, desired to have this action prosecuted to its fullest. As trustee in the bankruptcy action, you refused to proceed with the prosecution of this action because the successful conclusion of this action would only benefit my client. Thus, my client intends to pursue

> this action, and I will of course keep you advised of the progress of these proceedings.

There was no showing that the Trustee verbally, or in writing, responded to this letter. On or about August 3, 1988, Browning filed Defendant's Motion to Compel Disclosure and Substitution of Real Party-in-Interest and Brief in Support Thereof (PX 48), claiming uncertainty as to who owned the causes of action – Debtor or ICHI. The certificate of service on such motion shows that ICHI was notified of same, but not the Trustee.

On September 27, 1988, Baker, Mills & Glast ("BM&G"), ICHI's attorney, filed "Motion for Substitution of Industrial Clearinghouse, Inc. as Party Plaintiff", purporting to represent Plaintiff (which was improper for the reasons stated above), and the Court signed and [sic] order dated October 4, 1988, granting the substitution of ICHI as Plaintiff. (PXs 49-50). The 52-page transcript of the October 4, 1988 hearing shows that Browning was given full opportunity to present its position regarding ICHI at such hearing. Nothing prevented ICHI's attorneys, on behalf of ICHI, from filing their own motion for substitution of ICHI as allegedly proper plaintiff by reason of the foreclosure and purchase, if the foreclosure had been fully effective. Even though Browning fully participated in such October 4, 1988 hearing, no one appealed such October 4, 1988 substitution order, and, until the Trustee's motion to intervene before the District Court in April or May 1993, there is no showing that the Trustee ever objected to same. The Court does not condone the conduct of BM&G; however, no one sought, in this adversary, to take any action against BM&G. Further, while being active in the case at such point, Browning took no

timely action to appeal such October 4, 1988 order. The substitution of ICHI as party plaintiff, instead of Debtor, was the main reason the reference was withdrawn in January 1989, (PXs 51-52) because the remaining dispute was purportedly between two non-debtor parties. *See, Matter of Paso Del Norte Oil Co.*, 755 F.2d 421, 425 (5th Cir. 1985).

The Fourth Amended Complaint (PX 58) contains the following causes of action: (1) breaches of contracts; (2) conversion; (3) fraud concerning performance of contract; (4) fraud concerning execution of contract; (5) promissory estoppel; (6) contempt for willful violation of the automatic stay; (7) tortious interference with business relations; and (8) breach of fiduciary obligation arising from an alleged partnership with Coastal. The Fourth Amended Complaint seeks $23 million in damages, attorney fees, and unspecified punitive damages.

On September 28, 1990, counsel for ICHI and Browning executed a Status Report (PX 53) in which the procedural status of this case was described as follows:

> . . . Westinghouse Credit Corporation, the largest secured creditor, obtained relief from the automatic stay and conducted a foreclosure sale of all of the assets of Coastal Plains, including all potential claims or causes of action that Coastal Plains had against Browning. In February of 1987, Westinghouse Credit Corporation and Industrial [ICHI] entered into an agreement whereby Industrial purchased the remaining assets of Coastal Plains including all potential claims and causes of action against Browning held by Coastal Plains. Since all claims of

> Coastal Plains against Browning were transferred and assigned to Industrial, Industrial became the real party in interest in this litigation.

(PX 53, p. 2).

On August 28, 1992, the Trustee moved to close Coastal's bankruptcy case again and to be discharged as trustee. (PX 56).

On or about November 7, 1989, Browning filed "Defendant's Motion for Summary Judgment (Plaintiff's Bankruptcy Claim)". (PX 54). The undisputed facts set forth in this motion by Browning include the following:

> 13. WCC conducted a foreclosure sale on all assets of Coastal Plains that constituted part of WCC's collateral. The collateral included any and all potential claims or causes of action of Coastal Plains against Browning.
>
> 14. In February of 1987, WCC and ICHI entered into an agreement whereby ICHI purchased the remaining assets of Coastal Plains. Such assets included, *inter alia*, any and all potential claims and causes of action of Coastal Plains against Browning.
>
> 15. ICHI, as the putative real part in interest, substituted itself as plaintiff in the instant litigation.

(PX 54, p. 4). The Court is not ruling, in this opinion, that Browning is judicially estopped to contest ICHI's claims. Browning was not successful in its above referred-to motion for summary judgment. *U. S. Life Corp. v. U. S. Life*

Ins. Co., 560 F.Supp. 302 (N.D. Tex. 1983); *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990). Such inconsistent positions of Browning are cited to give a flavor of its multiple approaches to the same issues upon changes in counsel, or as this case has aged over the years.

While factual assertions in pleadings and pretrial orders can be binding on the party who made them (*White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983)), this Court has not bound Browning to such position in its rulings herein.

On August 8, 1991, District Judge Robert W. Porter issued a "Memorandum Opinion and Order of Remand" to the United States Magistrate Judge, as follows: "The plaintiff's motion for partial summary judgment of October 3, 1989, is **GRANTED** insofar as Browning's liability to Industrial is established." (PX 55, p. 24).

On May 3, 1993, the virtual eve or trial of this adversary proceeding before the District Court, the Trustee filed an emergency motion to intervene and for continuance, and, alternatively, for referral to the Bankruptcy Court.

Effect of WCC's Foreclosure Sale and Secured Party's Bill of Sale to Itself (PX 28)

In District Judge Porter's Opinion entered August 8, 1991 (PX 55, pp. 24-25), he found:

> . . . After careful consideration of the arguments presented by counsel in light of the pertinent authorities, the Court is of the opinion that no genuine issue of material fact exist[s] with regard to Browning's liability.

Principles of collateral estoppel bar relitigation of all issues that were litigated, determined, and necessary to the Bankruptcy Court's judgment in the turnover proceedings. *See, In re Owners of Harvey Oil Center,* 788 F.2d 275 (5th Cir. 1986). This includes issues relating to the construction of underlying contracts, namely, the Inventory Purchase Agreement of February 13, 1986, and the 'March 19th Agreement' of March 19, 1986. The May 23, 1986 Findings of Fact and Conclusions of Law in support of the 'Order for Turnover of Property and Granting Temporary Restraining Order' of the United States Bankruptcy Court are hereby **ADOPTED** as the Findings and Conclusions of this Court.

These findings establish (1) jurisdiction over the parties; (2) Browning's non-performance of the February 13, 1986, and March 19, 1986, agreements with Coastal Plains, Inc.; (3) the willful violation of the automatic stay by Browning. The plaintiff's motion for partial summary judgment of October 3, 1989, is **GRANTED** *insofar as Browning's liability to Industrial is established.*

At a minimum, fact issues remain regarding what amount of damages were caused by Browning's retention of the goods and whether Browning induced Coastal to ship goods to Browning by making a promise that it did not intend to keep. Because genuine issues of material fact exist requiring resolution by the fact-finder exist [sic], *defendant's motions for summary judgment on plaintiff's claims of fraud, tortious interference with contract and conversion are in all things* ***DENIED.***

> In light of the Court's disposition of the plaintiff's motion for partial summary judgment and the Court's adoption of the Findings of Fact and Conclusions of Law of the Bankruptcy Court, the defendant's motion for summary judgment on the plaintiff's contract claim is **DENIED.**

Id. (Footnote omitted). (Emphasis added).

Browning moved the District Court to reconsider such order and such motion was denied by Judge Jorge Solis on April 6, 1993. As was appropriate, Browning did not initially move this Court to reconsider such order, which, except for the intervention of the Trustee, would appear to have disposed of at least part of issue no. 1, *i.e.* ICHI's right to pursue the contract claims for violation of Coastal's contracts of February 13, 1986 and March 19, 1986.[2]

Notwithstanding the effect of Judge Porter's summary judgment order, it further appears that the Sale

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[2] If this Court were considering the collateral estoppel issue *de novo*, of the preliminary injunction order, which this Court signed, it would have reservations about the collateral estoppel effect of that preliminary order. This Court had already overruled Plaintiff's motion for summary judgment before the case was removed to District Court. (Tr. 10/4/88, p. 36). *See, Medtronic, Inc. v. Gibbons*, 684 F.2d 565, 569 (8th Cir. 1982); *Starbuck v. San Francisco*, 556 F.2d 450, 457 n. 13 (9th Cir. 1977); *Hunter Douglas, Inc. v. Sheet Metal Workers*, 714 F.2d 342 (4th Cir. 1983); *Tex. v. Wellington Resources Corp.*, 706 F.2d 533 (5th Cir. 1983). Even if the order was considered to be a partial turnover order, it appears that it was entered at a preliminary hearing, which would not have prevented Browning from contesting same at final trial on the merits.

foreclosed on Coastal's contract claims against Browning and WCC transferred its rights in such contract claims, bought at the Sale, to ICHI. The Sale was valid in such respect.

Under the article 9 definition of general intangibles, tort causes of action are not included. "General intangibles" is defined in Tex. Bus. & Com. Code Ann. § 9-106 (Vernon 1991). In that section, it includes "things in action", which would include contract claims. Section 9-104(11) excludes any claims in whole or part arising in tort. Courts have acknowledged that tort actions are not included in the UCC definition of general intangibles. *See, In re Ore Cargo, Inc.*, 544 F.2d 80 (2nd Cir. 1976); *In re Olm Associates*, 98 B.R. 271 (Bankr. N.D. Tex. 1989). Pennsylvania's Uniform Commercial Code (Penn. Stat. Tit. 13 § 9101 *et seq.*) is substantially similar.

WCC's security interest prior to bankruptcy was not broad enough to include tort causes of action.

The Post-Petition Financing Order (PX 14) granted WCC a lien on:

> . . . all presently owned or hereinafter acquired property, assets, rights and interests of Debtors [Coastal], all real and personal, tangible and intangible property of any kind or nature, except as modified herein including accounts, inventory, general intangibles, Cash Collateral, equipment, fixtures, real estate, all claims respecting and rights arising out of avoidable transfers and all property which is recovered or recoverable by the Debtors [Coastal] or any successor trustee, pursuant to any avoiding or recovery powers, including, without limitation,

> powers rising under Sections 544-545, 547-549, and 553 of the Bankruptcy Code. . . .

(PX 14, pp. 4-5, § 2). This grant was broad enough to include the tort claims. Coastal's tort claims against Browning and partnership claims for breach of fiduciary duties were not noticed for foreclosure or foreclosed on by WCC at the Sale. Neither WCC's Notice of Public Sale of Collateral (PX 24), nor the Rosen notice of auction (DX 23), nor did the Rosen public announcement at sale (DX 70, pp. 26-30) purport to foreclose upon the broader grant of post petition collateral described in Exhibit B to the Stipulation of Facts (PX 17), and to the Order Terminating Automatic Stay (PX 23). The bill of sale from WCC, as secured party, to WCC, as purchaser (PX 28), does not purport to sell WCC anything but assets set out in Exhibit A thereto, which does not include the tort claims, nor the partnership claims.

Debtor, through the Trustee, owns the tort causes of action, and partnership claims subject to the claimed security interest of WCC in the tort causes of action by virtue of the financing order.

The Order Terminating Stay

The September 19, 1986 Order Terminating Automatic Stay (PX 23) was never appealed and is valid. Browning, by Court order, withdrew its objection to WCC's motion to lift stay (PX 21), and also dropped its lawsuit filed to make WCC marshal the Debtor's assets (PXs 19 & 22).

Whether the Claims are Barred by Equitable or Judicial Estoppel

Browning claims that ICHI's claims are barred by equitable or judicial estoppel by reason of failure to list these claims in the Schedules, and by that portion of the stipulation reading: "The Debtors' general intangibles, consist of the Debtors' computer software programs, customer lists and vendor lists, and are worth less than $20,000.00."

Browning, the Trustee, and WCC, the main parties and players in Debtor's bankruptcy case, were, from the inception of Debtor's turnover lawsuit against Browning, aware of the existence and prosecution of such lawsuit even though it was not listed in the Schedules.

Browning actively participated in such lawsuit from the inception. As Browning has continually changed counsel during the lawsuit (and sued its first counsel for malpractice in this lawsuit) so has it changed its theories of defense.

At the inception, such lawsuit involved claims for: (a) temporary restraining order and injunctive relief; (b) turnover; (c) violation of the automatic stay; (d) breach of an inventory purchase agreement; (e) conversion of inventory; (f) interference with contracts and/or business relationships; and (g) actual and punitive damages.

Equitable Estoppel

Equitable estoppel focuses on the relationship between the parties and applies where one party has

detrimentally relied upon a factual assertion of the opposite party. *USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F.Supp. 1302, 1304 (N.D. Tex. 1983). Meaningful detrimental reliance has not occurred in this case. Browning has been actively engaged in this litigation from the inception and has known all along that damages were being sought against it. Neither Browning, nor WCC, nor the Trustee were misled by failure to list the lawsuit in the Schedules, nor by the Stipulation, or order on the motion to lift stay, nor by the substitution order.

Judicial Estoppel

In *USLIFE Corp. v. U.S. Life Ins. Co., supra* at 1304-1305, it is stated:

> [1-4] The doctrine of judicial estoppel is an equitable principle which generally operates to preclude a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation. *See generally* 1B *Moore's Federal Practice* ¶ 0.405[8] (1982). Judicial estoppel is distinct from equitable estoppel, which may also be applied to prevent a party from contradicting a position taken in a prior judicial proceeding. *See David v. Wakelee*, 156 U.S. 680, 15 S.Ct. 555, 39 L.Ed. 578 (1895). Equitable estoppel focuses on the relationship between the parties to the prior litigation, and it applies where one of the parties has detrimentally relied upon the position taken by the other party in the earlier proceeding. *See Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir.1982). Where prejudicial reliance upon the factual assertions of the opposing party has

> occurred, that party will be estopped from subsequently arguing a contrary position.
>
> [5] By contrast, the judicial estoppel doctrine looks to the relationship between the litigant and the judicial system and 'is intended to protect the integrity of the judicial process.' *Edwards*, 690 F.2d at 598. As a general matter, judicial estoppel applies in cases where a party attempts to contradict his own sworn statements in the prior litigation. The policy here is at least in part to preserve the 'sanctity of the oath.' *Moore's, supra*. More broadly speaking, courts seek to prevent parties from 'playing fast and loose' with them to suit the exigencies of self interest. *See Scarano v. Central Ry. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir.1953). Because the doctrine focuses on the relationship between the party to be estopped and the judicial system, courts generally find that it may be invoked by a person who was not party to the first suit. *See, e.g., Gottesman v. General Motors Corp.*, 222 F.Supp. 342, 344 (S.D.N.Y.1963).

Id.

Browning cites a number of cases[3] for the proposition that ICHI is judicially estopped from asserting any claims against Browning.

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[3] *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988); *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992); *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R. 158 (S.D. Inc. [sic] 1967); *Payless Wholesale Distributors, Inc. v. Alberto Culver*, 1993-1 Trade Cases (CCH) P 70, 178 (1st Cir. April 5, 1993); *Reynolds v. C.I.R.*, 861 F.2d 469 (6th Cir. 1988).

Browning further relies upon the following part of the Stipulation of Facts (PX 17) presented in conjunction with the Order Terminating Automatic Stay [PX 23], and more particularly the following wording: "(2) The Debtors' *general intangibles, consist of* the *Debtors' computer software programs, customer lists* and *vendor lists,* and are worth less than $20,000.00." (Emphasis added). Such stipulation also attached, as part of it, Exhibit B, reading as follows: **[QUOTED EARLIER AT PP. 9-10]**

> Property of Coastal Plains, Inc. . . . in which Westinghouse Credit Corporation holds a valid, prior, first and perfected security interest and lien pursuant to § 364(d)(1) of the Bankruptcy Code:
>
> A. All fixed assets, including all machinery and equipment, real and personal property leases . . . , licenses, patents, trademarks, copyrights, tradenames, goods, merchandise, materials, furniture, fixtures, vehicles, all other tangible personal property, and all insurance policies relating in whole or in part to the foregoing; and
>
> B. All property, real and personal, tangible and intangible of any kind or nature, including accounts, inventory, general intangibles, cash collateral, equipment, fixtures, real estate, all claims respecting and rights arising out of avoidable transfers and all property which is recovered or recoverable by the Debtors or any successor trustees, pursuant to any avoiding or recovery powers, including, without limitation, powers arising under §§ 544-549, and

> 553 of the Bankruptcy Code, and under any other law, together with all of the income, profits, proceeds, products, and rents thereof, whether arising before or after the commencement of these cases. . . .

Id. (PX 23).

Under the Post-Petition Financing Order, such collateral also included, as collateral, interest in property recoverable or recovered by the debtors or any trustee pursuant to any avoiding or recovery powers, including, without limitation, powers arising under the Bankruptcy Code and under any other law.

From the Stipulation of Facts (PX 17), it appears that WCC (Tr. 7/15/93, pp. 255, 262) and the Debtor's attorney had overlooked the existence of Exhibit B to the Stipulation of Facts and overlooked the Browning suit and causes of action from the recovery powers of Debtor or the Trustee in arriving at such $20,000 figure. The only items listed in relationship to the $20,000 figure were general intangibles consisting of computer software programs, customer lists, and vendor lists. Such omission appears to have been inadvertent, as opposed to any outright conspiracy, or "intentional self-contradiction being used as a means to obtain unfair advantage". In *Matter of Cassidy, supra* at 641, it is stated:

> Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir.1982). It is to be applied where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum

> designed for suitors seeking justice,' *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir.1953), to prevent litigants from 'playing fast and loose with the courts.' *Id.* 'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.'

WCC's attorneys prepared the stipulation. (Tr. 7/15/93, pp. 41, 215). Mr. Stohner, of J&W, checked it with his client for accuracy the morning of July 19, 1986 and signed it. It was not J&W's intent to omit mention of the Browning lawsuit from the stipulation. (Tr. 7/15/93, pp. 43, 215), nor was it the intent of WCC's attorney to do so. (Tr. 7/15/93, pp. 255, 262, 274). *See*, reference on p. 12 hereof. Further, as indicated, Exhibit B to the Stipulation, and the order lifting the stay (PX 23) specifically mentioned all WCC's collateral. It was not as limited as the stipulation and all were presented in Court at the same time. WCC's attorney testified that the stipulation of facts was intended to be a summary of testimony of the auctioneer and WCC's agent Schuster in terms of valuation of assets to which the auctioneer could testify. The stipulation was not intended by WCC as an exhaustive listing of assets which were listed in the order lifting stay. (Tr. 7/15/93, pp. 277-278). It had initially been drawn up as proposed findings of fact.

As of September 19, 1986, the date the Order Terminating Automatic Stay (PX 23) was signed by the Court, Wayne Duke, President of ICHI and CEO of Debtor, believed that Browning's damages to Debtor were in the $10 million range. (Duke testimony, 10/13/93). It appears that such lawsuit did have value, but such value did not

approach the projected deficiency of approximately $5 million that WCC anticipated would exist after its Sale. Even considering the Browning lawsuit and all other assets of Coastal, Coastal did not have any equity in the WCC pre and post-petition collateral at the time the stay was lifted. (Tr. 7/15/93, pp. 296, 303). After the WCC foreclosure, WCC's attorney apparently investigated the lawsuit (because he thought it had been foreclosed on), and apparently concluded that it was a nuisance value lawsuit. (Tr. 7/15/93, pp. 49-51, 262). WCC did not want to spend money on pursuing the remaining Browning claims. (Tr. 7/15/93, p. 262). To this date, as evidenced by the settlement agreement hearings, WCC prefers to sit on the sidelines. Schuster, agent of WCC, concluded that the lawsuit had no substantial value. (Schuster deposition, p. 17).

The U. S. Trustee's office signed off on the order lifting the stay, under such office's handwritten caption "no objection based on stipulations". (DX 20, p. 6).

The tort claims are not discussed in such $20,000 stipulated amount, and were not foreclosed upon. Such tort claims were not affected by judicial estoppel.

Generally, stay litigation orders would not furnish a grounds for *res judicata* or collateral estoppel because of the expedited nature of such proceedings. *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989).

By judicial estoppel, does WCC's stipulation (PX 17) stating that "Debtors' general intangibles, consist of the Debtors' computer software programs, customer lists and vendor lists, and are worth less than $20,000.00" limit the foreclosure notice insofar as the contract claims against

Browning are concerned? It appears that such stipulation did not limit WCC's foreclosure of contract rights to $20,000. Exhibit B to the Stipulation, and the order lifting the stay (PX 23) referenced all the contract rights collateral. Exhibit A to the Notice of Public Sale of Collateral (PX 24) specifically refers to general intangibles and contract rights. At p. 26 of the Sale statement of facts, Rosen mentions "customer lists, vendor lists, any other intangible assets of the corporation." At p. 30, he mentions that the bulk bid is for "all 13 lot numbers as we have outlined . . . computer software and general intangibles. . . . "

On this record, there is insufficient factual or legal justification to show that ICHI should be judicially estopped or barred by *res judicata* from asserting that contract claims of Coastal are limited to $20,000.

Additionally, there was insufficient proof that the principals of Coastal, ICHI, or WCC, or their attorneys participated in a fraud on the Court or creditors with respect to the lifting of the stay, stipulation, or listing of assets on Debtor's schedules.[4]

World War III

Over the course of eight years, with the ingenuity of counsel on both sides, the lawsuit and its response have grown like "Topsy", but the basic issues remain the same.

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[4] As previously indicated, J&W's non-disclosure conduct was improper, as well as its simultaneous representation of Debtor and ICHI. No relief was sought from J&W in this adversary.

The course of this lawsuit is an indication of what is sometimes wrong with the litigation system. Instead of just trying this lawsuit, the parties have reenacted World War III in their discovery and pleading approaches. There are indications that Browning has already spent at least $1 million in attorney fees in defense of this lawsuit, and possibly as much as $4 million. From the limited damages testimony presented so far (and it is fully recognized that ICHI and the Trustee have not yet had the necessity to lay out the damages in exhaustive detail), it is anticipated that, if Browning had just tried the damages portion of this case, its out-of-pocket expenses and exposure would not have equaled or exceeded what it is spending and has spent on defense. The Trustee's "toe in the cold ocean water approach" to getting into the lawsuit, and his "on again, off again" settlement strategy and efforts have further delayed resolution of this matter.

Violations of the Stay

Any Debtor or Trustee causes of action, if any, that exist for contempt for violations of the stay, were not noticed (PX 24 Exhibit A) or foreclosed upon by WCC, and belong to the Trustee. It further appears that policy-wise, same could not be transferred by Debtor or WCC to ICHI, a third party non pre-petition creditor. *In re Prairie Truck Ry.*, 112 B.R. 924 (Bankr. N.D. Ill. 1990); *In re Pointer*, 952 F.2d 82, 83 (5th Cir. 1992); *Interstate Commerce Commission v. Wagonmaster, Inc. and Wilson*, 1994 WL 53757 (N.D. Ill. 1994). WCC is not a party to this adversary. It is unnecessary to decide the effectiveness of the financing orders purporting to grant WCC a security interest in such limited cause of action.

Various Other Contentions

The parties have various other contentions in briefs which are outside the purview of this court's order of July 6, 1993, regarding the scope of the hearing. For example, in ICHI's brief at p. 25, n. 10, it raises the contention that the Trustee is barred by laches. In view of the potential ICHI settlement with the Trustee and the fact that this issue was not set out in this Court's order of July 6, 1993, such issue need not be addressed. Likewise, limitations was not set out as an item to be addressed in the July 6, 1993 order.

Additional Findings and Conclusions

To the extent not duplicative or inconsistent with the above, the Court adopts the following proposed Findings of Fact of the Trustee: Nos. 1-3, 5-10, 13, 15, 17-19, 22, 25, 28-31, 33, 36, 38, 40-42, 48-50, 52, 56, 58, 75, 81, 87, 90-91, 93-94, and the Trustee's proposed Conclusions of Law Nos. 1-4, 13-14.

Browning attached its proposed findings of fact and conclusions of law to its motion for reconsideration. Most of same have been addressed in the Amended Memorandum Opinion. To complete the record, the Court makes the following rulings with respect thereto:

> Proposed Findings of Fact ("PFF") 1 and 2 are adopted. The first sentence of PFF 3 is adopted; the second sentence is denied. PFF 4 is adopted. PFF 5 is denied. PFF 6 is adopted. PFF 7 is denied. The "Browning Lawsuit" was not mentioned, but "contract rights" and "general intangibles" were specifically referred to. (DX 22).

The first sentence of PFF 8 is adopted; the second sentence is denied for reasons previously stated. PFFs 9-17 are adopted. Proposed Conclusions of Law 10 and 11 are adopted. The opinion shows this Court's conclusions with respect to Defendant's legal contentions.

Future Course of This Litigation

It appears that, in view of the age of this litigation, it should be put on an expedited trial schedule. There should be little need for any substantial additional discovery. This case has been discovered and pre-tried *ad infinitum*. Under any scenario, it appears that, as found above, ICHI owns part of the causes of action asserted herein. ICHI has requested a jury. Undoubtedly, the parties will appeal this Court's judgment on this Opinion. After this court rules on the proposed settlement between ICHI and the Trustee, by separate findings, conclusions and order herein, it appears that judicial economy would dictate the District Court's withdrawal of the reference to try the remaining issues between all parties.[5] It further appears that it would be judicially economical for one District Judge to handle any appeal from this order, as well as the jury trial.

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[5] At best, there are "related" causes of action involved in this lawsuit. While some courts have allowed Bankruptcy Courts to try "core" issues with a jury, all courts hold that, where a party is entitled to a jury, "related" causes of action must be tried in the District Court. *M & E Contractors v. Kugler-Morris General Contractors*, 67 B.R. 260, 267 (N.D. Tex. 1986); *In re Orion Pictures Corp.*, 4 F.3d 1095 (2nd Cir. 1993).

This Amended Memorandum Opinion supersedes and replaces the prior opinion rendered herein.

An order will be entered in accordance with the foregoing opinion.

Signed: 5-17-94.

/s/ Robert C. McGuire
Robert C. McGuire
U. S. Bankruptcy Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

INDUSTRIAL CLEARINGHOUSE, INC. AND DUKE SALISBURY, TRUSTEE OF THE ESTATE OF COASTAL PLAINS, INC.	§	CASE NO.
V.	§	3-94-CV-1325-P
BROWNING MANUFACTURING, formerly a Division of Emerson Electric Company, Emerson Power Transmission Corporation	§	

ORDER

(Filed Nov. 1, 1994)

Presently before the Court is the appeal from a decision of the Bankruptcy Court entered May 17, 1994. Appellant, Browning Manufacturing ("Browning"), filed its notice of appeal on June 16, 1994, of the following Orders, Opinions, and Judgments of the Bankruptcy Court: (1) Findings of Fact and Conclusions of Law on Trustee's Proposed Compromise; and (2) Order on Settlement Agreement. The case was docketed by the district clerk on July 5, 1994.

In its May 17, 1994 Order, the Bankruptcy Court found that Industrial Clearinghouse, Inc. ("ICI"), successor in interest to the debtor, Coastal Plains, Inc. ("Coastal"), owned the following contractual claims asserted against Browning: (1) breach of contract, and 2) promissory estoppel. Moreover, the Bankruptcy Court

found that the Trustee owned Coastal's remaining causes of action asserted against Browning in the complaint for: (1) conversion, (2) fraud regarding performance of the contract, (3) fraud concerning execution of the contract, (4) contempt for violation of the stay, (5) tortious interference with business relations, and (6) breach of fiduciary relationship arising out of an alleged partnership agreement.

In addition, the Bankruptcy Court held that if the settlement agreement ("Settlement") between the Trustee and ICI is consummated as set forth in the Findings of Fact and Conclusions of Law On Trustee's Proposed Compromise, dated May 17, 1994, then the causes of action described in the complaint will be owned as set forth in the Settlement. Basically, the approved Settlement provides that ICI will own all claims against Browning, to the extent legally permissible, and that the Trustee will receive 15% of the gross recovery on all claims against Browning.

On appeal, Browning argues that the plaintiffs should be estopped from pursuing the above mentioned claims. Browning asserts that equitable estoppel should apply because Coastal allegedly misrepresented that no claims existed against Browning during the bankruptcy proceeding. Furthermore, Browning argues that it reasonably relied upon Coastal's statements that it had no claims of any consequence. Accordingly, Browning contends that the value of the claims were not disclosed until after ICI had moved the case out of the Bankruptcy Court.

Furthermore, Browning argues that judicial estoppel should apply in this case because the plaintiff has taken inconsistent positions during the bankruptcy proceeding and the current proceeding.

In addition to the estoppel arguments discussed above, Browning also asserts that the Bankruptcy Court's approval of the Settlement is unwarranted because of the following: (1) the Trustee failed to produce any evidence that the Settlement was in the best interest of the estate, (2) the equities preclude this possibility, and (3) the Settlement is substantively defective.

JURISDICTION

This is an appeal from two Orders of the United States Bankruptcy Court for the Northern District of Texas entered on May 17, 1994. The Court has jurisdiction under 28 U.S.C. § 158(a).

STANDARD OF REVIEW

The Bankruptcy Court may approve a compromise or settlement in accordance with Bankruptcy Rule 9019(a). A Bankruptcy Court's approval of a settlement will not be reversed unless the approval was an abuse of discretion. *In re AWECO, Inc.*, 725 F.2d 293, 297 (5th Cir. 1984), *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1158-59 (5th Cir. 1988). Factual findings underlying the approval of a settlement will be accepted by the appellate court unless the findings are clearly erroneous. Bankruptcy Rule 8013; *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303

(5th Cir. 1982). Legal determinations are reviewed *de novo*. 762 F.2d at 1307.

STANDING

Before the Court turns to the primary issues on appeal, it must first rule on whether Browning has standing to contest the approval of the Settlement. A party has standing to appeal if its rights or interests are directly and adversely affected pecuniarily by the decree or order. *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989). The Court finds that Browning does have standing to contest the Settlement because the agreement adversely affects Browning's property interests and rights in this proceeding.

ESTOPPEL ISSUES

Judicial estoppel is a technical rule designed to meet needs of broad public policy. *Johnson Service v. Transamerica Insurance Co.*, 485 F.2d 164, 175 (5th Cir. 1973). It is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings. *Id.* Because the rule looks toward cold manipulation and not an unthinking or confused blunder, it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake. *Id.*

Browning argues that judicial estoppel should apply because the claims were not listed in the bankruptcy schedules, nor were they represented to the creditors

during the bankruptcy proceeding. However, the Bankruptcy Court found that judicial estoppel should not apply because the omissions were inadvertent, as opposed to any outright conspiracy, or intentional self-contradiction being used as a means to obtain any unfair advantage. Bankruptcy Mem. Opinion, May 17, 1994, p. 25. Furthermore, the Bankruptcy Court found no intent to omit mention of the Browning lawsuit from the debtor's stipulation of facts filed with the Bankruptcy Court. Bankruptcy Mem. Opinion, May 17, 1994, p. 26. The stipulation of facts was not intended by Westinghouse Credit Corp. ("WCC") as an exhaustive listing of assets which were listed in the order lifting stay. *Id.* Rather, it was intended to be a summary of testimony of the auctioneer and WCC's agent Schuster in terms of valuation of assets to which the auctioneer could testify. *Id.* This Court agrees with the Bankruptcy Court's findings and holds that judicial estoppel should not be applied in this proceeding.

Equitable estoppel focuses on the relationship between the parties and applies where one party has detrimentally relied upon a factual assertion of the opposite party. *USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F.Supp. 1302, 1304 (N.D. Tex. 1983). Browning argues that it would have objected to an Order lifting the automatic stay had it known that a claim for $10 million rather than one for less than $20,000 was included in the collateral.

However, the Bankruptcy Court found that all three main parties in the bankruptcy case, Browning, the Trustee, and WCC, were aware of the existence and prosecution of this lawsuit from the inception of the Debtor's turnover lawsuit against Browning, even though it was

not listed in the bankruptcy schedules. Bankruptcy Mem. Opinion, May 17, 1994, p. 22. Moreover, the Bankruptcy Court held that Browning actively participated in this lawsuit from the inception. *Id.* Therefore, the Bankruptcy Court ruled that equitable estoppel should not apply because Browning has been actively engaged in this litigation from the inception, and it has known all along that damages were being sought against it. Bankruptcy Mem. Opinion, May 17, 1994, p. 22. This Court agrees with the Bankruptcy Court's finding. It is difficult to conceive that Browning should not have been aware of the claims after considering the fact that Browning was an active participant in the underlying transactions which gave rise to this lawsuit. Thus, equitable estoppel should not be applied in this case.

APPROVAL OF SETTLEMENT

Browning argues that the Bankruptcy Court should not have approved the Settlement for the following three reasons: (1) the Trustee failed to produce any evidence that the Settlement was in the best interest of the debtor's estate, (2) the equities preclude this possibility because the Trustee accuses the parties he settled with of criminal fraud, and (3) the Settlement is substantively defective. Browning asserts that the Trustee failed to put on any credible evidence relating to the factors that a court usually considers in approving a settlement, and that the Bankruptcy Court made no findings. Among these factors are: (1) the probability of success, (2) the complexity, expense, and duration of the case, (3) the difficulties of

discovery and collecting on judgment, and (4) the comparison of the terms of the compromise with likely recovery.

However, when one reviews the Bankruptcy Court's Memorandum Opinion dated May 17, 1994, and the Findings of Fact and Conclusions of Law on Trustee's Proposed Compromise, Browning's arguments are without merit. First of all, this lawsuit has been ongoing for the past eight years. The estate is a no-asset estate. Findings of Facts, p. 4. Consequently, the Trustee has no funds on hand to prosecute claims against Browning or anyone else. *Id.* Mr. Long, an attorney for ICI, credibly testified that Browning's counsel advised him that Browning was going to adopt a scorched earth policy in the case, which is a major reason why this case has been held up since 1986. *Id.* The parties have spent a tremendous amount of money on legal fees alone during the course of this proceeding. As one might expect, the activity of the parties has caused the issues to be legally and factually complex.

Thus, the Bankruptcy Court found that in the present posture of this case, absent such a settlement, it appears that the estate would have to abandon its claims by reason of its financial inability to prosecute the case. *Id.* at 7. After reviewing all the evidence in this case and its relation to the above mentioned factors, this Court agrees with the Bankruptcy Court and concludes that the Settlement was in the best interest of the estate.

Moreover, Browning argues that the Trustee should not be allowed to settle with parties whom he accuses of participating in a criminal fraud scheme. However, as

already discussed in the Estoppel Section above, the Bankruptcy Court correctly determined that insufficient evidence exists to conclude that the parties participated in a criminal fraud scheme. Thus, equities do not preclude the finding that the Settlement is unwarranted.

In addition, Browning argues that the Settlement is defective because the Trustee failed to comply with the requirements of notice and opportunity to bid contained in 11 U.S.C. 363. However, the Bankruptcy Court specifically prescribed the scope and notice to be given in connection with this Settlement. This Court agrees with the Bankruptcy Court's determination of scope and notice in this case. Therefore, this Court is of the opinion that the Settlement is not substantively defective.

Accordingly, the Bankruptcy Court's Order approving the settlement agreement between ICI and the Trustee is affirmed.

So Ordered.

Signed this 1st day of ~~September~~ November, 1994.

/s/ Jorge A. Solis
Jorge A. Solis
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-11118

In The Matter Of: COASTAL PLAINS, INC

Debtor

BROWNING MANUFACTURING

Appellant-Cross-Appellee

v.

JEFFREY H MIMS, Trustee for the Bankruptcy Estate of Coastal Plains, Inc; INDUSTRIAL CLEARINGHOUSE, INC

Appellees-Cross-Appellants

INDUSTRIAL CLEARINGHOUSE, INC, Successor in interest to Coastal Plains Inc; JEFFREY H MIMS, Trustee of the Estate of Coastal Plains, Inc

Appellees-Cross-Appellants

v.

BROWNING MANUFACTURING, formerly known as Emerson Electric Company, formerly known as Emerson Power Transmission Corporation

Appellant-Cross-Appellee

No. 97-11119

In The Matter Of: COASTAL PLAINS, INC
Debtor

INDUSTRIAL CLEARINGHOUSE, INC; JEFFREY H MIMS, Trustee of The Estate of Coastal Plains Inc

Appellees-Appellants

v.

BROWNING MANUFACTURING, formerly a Division of Emerson Electric Company

Appellant-Appellee

No. 98-10246

In The Matter Of: COASTAL PLAINS, INC.

Debtor

BROWNING MANUFACTURING

Appellant

v.

JEFFREY H MIMS, Trustee for the Bankruptcy Estate of Coastal Plains, Inc; INDUSTRIAL CLEARINGHOUSE, INC

Appellees

INDUSTRIAL CLEARINGHOUSE, INC, Successor in interest to Coastal Plains, Inc; JEFFREY H MIMS, Trustee of the Estate of Coastal Plains, Inc

Appellees

v.

BROWNING MANUFACTURING, formerly known as Emerson Electric Company, formerly known as Emerson Power Transmission Corporation

Appellant

Appeals from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Filed Aug. 4, 1999)

(Opinion 06/18/99, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, POLITZ, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P.

and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

REHG-4A

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

INDUSTRIAL CLEARINGHOUSE, INC., ET AL.,	§	
Plaintiffs,	§	3:94 CV 1955 P
	§	NO. 3:94-CV-1325-P
vs.	§	
BROWNING MANUFACTURING, A DIVISION OF EMERSON ELECTRIC COMPANY, FORMERLY A DIVISION OF EMERSON ELECTRIC COMPANY,	§	
Defendant.	§	

FIRST AMENDED FINAL JUDGMENT

(Filed Mar. 17, 1998)

Pursuant to the jury verdict of March 1, 1996, and the Court's order of September 16, 1997, and the Plaintiffs' election filed October 3, 1997,

It is ORDERED ADJUDGED and DECREED that:

Plaintiffs are awarded:

1. $5,000,000.00 on their contract claim. Plaintiffs' contract claim shall carry prejudgment interest from May 1, 1986 through May 2, 1993, at the rate of 10% compounded annually;

2. Plaintiffs are awarded $60,682.71 on their failure to return deposit claim. This claim shall carry prejudgment interest from the date the deposit was due and payable through May 2, 1993, at the rate of 6% simple interest;

3. Plaintiffs are awarded costs of court;

3. Plaintiffs are awarded costs of court; [sic]

4. Plaintiffs' contract claim and failure to return deposit claim are awarded post-judgment interest from January 23, 1997 until paid at the rate of 5.61%.

5. Plaintiffs are awarded attorneys fees and costs of court; and

6. Defendant is awarded $1,351,977.07 on its claims of setoff. Defendant is awarded prejudgment interest on its setoff claim at the rate of 6% simple interest beginning on the 30th day after October 17, 1986 through May 2, 1993

IT IS SO ORDERED.

Signed this 17th day of March, 1998 at Dallas, Texas.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

(2)

No. 99-756

Supreme Court, U.S.
FILED
DEC 16 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEFFREY H. MIMS, Trustee of the Estate of Coastal Plains, Inc., and INDUSTRIAL CLEARINGHOUSE, INC.,

Petitioners,

v.

BROWNING MANUFACTURING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED RESTATED

Pursuant to Sup. Ct. R. 24(a), Respondent Browning Manufacturing ("Browning") restates the issues raised in the Petition as follows:

1. Given that there is no circuit conflict, should this Court review the application of judicial estoppel to claims that a corporate debtor failed to disclose as required by § 521(1) of the Bankruptcy Code, 11 U.S.C. § 521(1)?

2. Should this Court review the application of judicial estoppel to the undisclosed claims of a corporate debtor that are being asserted by a purchaser of those claims, where the purchaser is a corporation created by the principals of the debtor corporation that concealed those claims?

3. Should this Court review the application of judicial estoppel to undisclosed claims asserted by a bankruptcy trustee who – despite knowing that judicial estoppel might bar recovery and despite having himself raised allegations of fraud involving the debtor's successor-in-interest asserting the debtor's claims – nevertheless gave up 85% of the estate's claims to the company formed by the very person who had concealed those claims, and obtained in return only the right to 15% of any eventual recovery?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. Respondent Browning Manufacturing is a Division of Emerson Power Transmission Corporation, which is a wholly owned subsidiary of EECO, Inc., which, in turn, is a wholly owned subsidiary of Emerson Electric Co. Browning Manufacturing was formerly a division of Emerson Electric Co.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED RESTATED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Statement of Facts 3

1. Coastal Was Headed for Bankruptcy Before the Events That Formed the Basis for Plaintiffs' Claims Against Browning 3

2. Coastal Proposed a Workout Plan That Amounted to a Ransom Demand for Unpaid-for Inventory Held Hostage by Coastal 4

3. Beleaguered by Lawsuits and Unable to Pay Its Debts, Coastal Filed Bankruptcy .. 5

4. Although Coastal's Wayne Duke Believed That Coastal's Claims Against Browning Were Still Worth Millions, Coastal Failed to Disclose Those Claims as Required by Bankruptcy Law 6

5. Plaintiffs Never Offered a Cogent Explanation for the Omission of Coastal's Claims 8

6. The Principals of the Bankrupt Coastal Formed a New Company (ICHI), Which Acquired Coastal's Assets at Bargain Rates and Continued in Business 9

7. Nevertheless, Plaintiffs Pursued Claims Against Browning for Allegedly Bankrupting Coastal 10

TABLE OF CONTENTS – Continued

Page

REASONS FOR DENYING THE WRIT 12

I. The Questions Presented in the Petition Were Not Preserved or Decided Below and Thus Have Been Waived 12

II. There Is No Circuit Conflict on the Real Issue Raised by This Case 13

A. An Abstract Question Concerning the Viability of Judicial Estoppel as a Legal Doctrine Does Not Present a Case or Controversy 14

B. No Circuit Conflict Exists on the Real Issue Here – Whether Judicial Estoppel Can Apply Where a Debtor Has Failed to Disclose Claims 15

C. Nor Is There Any Circuit Conflict as to the Nuances of How Judicial Estoppel Should Be Applied 17

D. The Distinguishable Maryland State Court Case Relied on by Plaintiffs Does Not Create a Conflict Warranting Review by this Court 19

III. Given That There Is No Circuit Conflict, the Applicability of Judicial Estoppel to a Claim Omitted From a Bankruptcy Schedule Does Not Raise a Significant Issue Worthy of Certiorari Review 22

A. The Fifth Circuit Properly Applied Judicial Estoppel to a Claim Omitted by a Bankruptcy Debtor 22

TABLE OF CONTENTS – Continued

Page

B. Judicial Estoppel Applies to Undisclosed Claims Pursued by the Bankruptcy Trustee or Other Parties in Privity with the Debtor ... 23

C. In Any Event, This Case Is Not an Appropriate Vehicle for Considering Whether Judicial Estoppel Should Be Applied to an Innocent Third-Party Purchaser or an Unsuspecting Trustee 26

IV. Defects in Plaintiffs' Causation Proof Under Texas State Law Independently Support the Judgment of the Fifth Circuit 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)..... 12

Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 14

Angeles Real Estate Co. v. Kerxton, 737 F.2d 416 (4th Cir. 1984) 24

Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540 (7th Cir. 1990) 18

Bank of Marin v. England, 385 U.S. 81 (1966).....22, 24

Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497 (Tex. 1995) 29

Cafferty v. Thompson, 223 A.D.2d 99, 644 N.Y.S.2d 584 (1996)..... 21

Caplener v. United States Nat'l Bank of Oregon, 857 P.2d 830 (Or. 1993) 21

Chandler v. Samford Univ., 35 F. Supp. 2d 861 (N.D. Ala. 1999)..... 21

Conrad v. Bank of America, 45 Cal. App. 4th 133, 53 Cal. Rptr. 2d 336 (1996) 21

Deloach v. Provident Health Services, Inc., 1993 WL 850445 (S.D. Ga. 1993).....18, 25

Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.), 119 F.3d 852 (10th Cir. 1997) 16

Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1995) 28, 29

In re Charter Executive Center Ltd., 34 B.R. 131 (Bankr. M.D. Fla. 1983) 24, 25

TABLE OF AUTHORITIES – Continued

Page

In re Easy Living, Inc., 407 F.2d 142 (6th Cir. 1969) 24

In re Fineberg, 202 B.R. 206 (Bankr. E.D. Pa. 1996)...21, 24

In re Freedom Ford, Inc., 140 B.R. 585 (Bankr. M.D. Fla. 1992) 21

In re Galerie Des Monnaies of Geneva, Ltd., 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986) 21

In re Hoffman, 99 B.R. 929 (N.D. Iowa 1989)..... 21

In re H.R.P. Auto Center, Inc., 130 B.R. 247 (Bankr. N.D. Ohio 1991)..... 21

In re Little, 126 B.R. 861 (Bankr. N.D. Miss. 1991) 21

In re Louden, 106 B.R. 109 (Bankr. E.D. Ky. 1989) 21

In re Mahan, 104 B.R. 300 (Bankr. E.D. Cal. 1989) 23

In re Okan's Foods, Inc., 217 B.R. 739 (Bankr. E.D. Pa. 1998).....19, 21

In re Ostrom-Martin, Inc., 188 B.R. 245 (Bankr. C.D. Ill. 1995) 25

In re Payroll Express Corp., 921 F. Supp. 1121 (S.D.N.Y. 1996) 18, 25

In re Schauer, 835 F.2d 1222 (8th Cir. 1987)..... 24

In re Tippins, 221 B.R. 11 (Bankr. E.D. Ala. 1998) 21

Integrated Solutions, Inc. v. Service Support Specialities, 124 F.3d 487 (3d Cir. 1997) 23

Int'l Engine Parts, Inc. v. Feddersen & Co., 64 Cal. App. 4th 345, 75 Cal. Rptr. 2d 178 (1998)..... 21

TABLE OF AUTHORITIES – Continued

Page

Jackson Jordan, Inc. v. Plasser Am. Corp., 747 F.2d 1567 (Fed. Cir. 1984) 17

Kunica v. St. Jean Financial, Inc., 233 B.R. 46 (S.D.N.Y. 1999), *aff'd*, 63 F. Supp. 2d 342 (S.D.N.Y. 1999) 21, 24

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 16

Luna v. Dominion Bank of Middle Tennessee, Inc., 631 So. 2d 917 (Ala. 1993) 21

Matter of Cassidy, 892 F.2d 637 (7th Cir. 1990) 18

Matter of Sanders, 969 F.2d 591 (7th Cir. 1992) 24

Moore v. El Paso County, Texas, 660 F.2d 586 (5th Cir. 1981) 13

Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988) 15, 19, 20, 25

Pako Corp. v. Citytrust, 109 B.R. 368 (D. Minn. 1989) 21, 25

Payless Wholesale Distrib., Inc. v. Alberto Culver (P.R.), Inc., 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931 (1993) 15, 27

Rosenshein v. Kleban, 918 F. Supp. 98 (S.D.N.Y. 1996) 21, 23

Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996) 17, 18, 19, 20, 23

Sender v. Simon, 84 F.3d 1299 (10th Cir. 1996) 24, 25

South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Texas, 614 F.2d 1056 (5th Cir. 1980) 24

TABLE OF AUTHORITIES – Continued

Page

Southmark Corp. v. Trotter, Smith & Jacobs, 442 S.E.2d 265 (Ga. App. 1994) 21

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Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 13

Union Pump Co. v. Allbritton, 898 S.W.2d 773 (Tex. 1995) 29

United States v. Arthur Young & Co., 465 U.S. 805 (1984) 28

United States v. Fruehauf, 365 U.S. 146 (1961) 14

Vartman v. First Nat'l Bank of Waterloo, 216 U.S. 134 (1910) 24

Welsh v. Quabbin Timber, Inc., 199 B.R. 224 (D. Mass. 1996) 21

Winmark Limited Partnership v. Miles & Stockbridge, 693 A.2d 824 (Md. 1997) 20, 21

Wyle v. R.J. Reynolds Ind., Inc., 709 F.2d 585 (9th Cir. 1983) 24

Young v. United States Dep't of Justice, 882 F.2d 633 (2d Cir. 1989) 17

Youngblood Group v. Lufkin Federal Savings & Loan Ass'n, 932 F. Supp. 859 (E.D. Tex. 1996) 21

Zwemer v. Product Credit Ass'n of Midlands, 792 P.2d 245 (Wyo. 1990) 21

RULES AND STATUTES

Supreme Court Rule
24(a) i

11 U.S.C.
§ 108(a) 24

§ 503 ..... 20, 26

TABLE OF AUTHORITIES – Continued

Page

§ 521(1) ..... i, 1, 6, 15

§ 554 ..... 1, 13, 22

§ 704 ..... 22, 23

§ 1107(a) 25

OTHER

H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977) 24

S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978) 24

BRIEF IN OPPOSITION

Respondent Browning Manufacturing ("Browning") respectfully files this Brief in Opposition to the Petition for Writ of Certiorari filed by Plaintiffs Industrial Clearinghouse, Inc. ("ICHI") and Jeffrey H. Mims, the Trustee of the Bankruptcy Estate of Coastal Plains, Inc. ("the trustee"). (ICHI and the trustee are collectively referred to as "Plaintiffs.")

STATEMENT OF THE CASE

A. Nature of the Case

This commercial dispute involves an adversary proceeding ancillary to the bankruptcy of Coastal Plains, Inc. ("Coastal"). The Fifth Circuit held that, under the circumstances of this case, judicial estoppel applied to causes of action not disclosed by Coastal on its bankruptcy schedules as required by § 521(1) of the Bankruptcy Code. 11 U.S.C. § 521(1). Contrary to the suggestion of the Petition, there is no circuit split on that issue. Every circuit to consider the issue has concluded that judicial estoppel can (and, under appropriate circumstances, should) apply where a debtor fails to disclose claims as required by bankruptcy law. *See* 15, *infra.* The Fifth Circuit merely applied judicial estoppel as it has routinely been applied by numerous circuit, district, bankruptcy, and state courts. *See* 15, 21 n.4, *infra.*

This case certainly does not present the issue whether the entire doctrine of judicial estoppel should be abolished across the board in federal cases. *Plaintiffs have never before made that argument in the more than six years since Browning first raised judicial estoppel,* and should not be heard to make that argument now. *See* 12, *infra.* Nor did Plaintiffs argue below that application of judicial estoppel would be inconsistent with § 554 or any other

section of the Bankruptcy Code (an argument that is, in any event, without merit). *See* 13, *infra*.

Another issue not presented by this case is whether judicial estoppel should be applied with respect to claims of a debtor that are being asserted by an innocent third-party purchaser or by an unsuspecting bankruptcy trustee. It is undisputed in this case that the purchaser of the debtor's claims was a corporation (ICHI) formed by the principals of the debtor corporation (Coastal) that had concealed those claims on its bankruptcy schedules. As for the trustee, he is only entitled to 15% of any recovery pursuant to a deal that he made with ICHI, despite knowing that the claims being asserted by ICHI were subject to a judicial estoppel defense and despite having himself raised allegations of fraud involving ICHI. *See* 10-11, 26-27, *infra*. In any event, it is hornbook law that a bankruptcy trustee is subject to the same defenses (such as judicial estoppel) that could have been asserted against the debtor. *See* 22-24, *infra*.

While the Fifth Circuit decided this case based on judicial estoppel, Browning also urged a number of other arguments in support of reversal, including an argument that the district court's judgment had to be reversed based on the absence of evidence satisfying Texas causation standards. There was simply no evidence to support Plaintiffs' theory that, although Coastal admittedly was on the brink of bankruptcy before any of Browning's alleged wrongful conduct, prosperity was just around the corner and Coastal would have blossomed into a successful company but for Browning's brief delay in delivering certain inventory to Coastal for which Coastal had never paid Browning in the first place. Thus, the district court's judgment would have had to be reversed as a result of the absence of legally sufficient causation evidence (as well as a result of other errors) regardless of the Fifth Circuit's judicial estoppel ruling. *See* 28-29, *infra*.

B. Statement of Facts[1]

1. Coastal Was Headed for Bankruptcy Before the Events That Formed the Basis for Plaintiffs' Claims Against Browning.

Coastal, an equipment distributor, was purchased by Bill Young in August 1984 using leveraged buyout techniques (*i.e.*, using the assets of the acquired company to generate funds to pay the previous owner). Pet. App. 3; 18-V53:66-7. At the time of the purchase, Coastal was already losing money. 18-V52:20, 78.

After being acquired by Young, Coastal continued to have serious financial problems and was cut off by a number of major suppliers. DX-233, DX-246, DX-310; 18-V53:85-90, 99-103, 126-27; DX-282. By mid-1985, Coastal's cash flow problems had reached the point that Coastal was unable to pay its debts as they came due. 18-V52:113-14; 18-V53:106-11. A number of suppliers took or threatened to take legal action against Coastal based on its failure to pay for goods sold to Coastal. 18-V53:83-85, 101-03, 110-11, 130-31; 18-V57:212; DX-234, DX-239, DX-311, DX-305. Coastal also fell behind on office and equipment rental payments. 18-V53:131-35; DX-315. Coastal's problems were worsened by the loss of a major customer at the end of 1985 as a result of "deterioration of service" from Coastal. DX-307; 18-V56:131-32.

Coastal even failed to pay its payroll taxes, resulting in personal liability of $225,000 for Young. 18-V53:136-37. Indeed, Coastal's own auditors felt compelled to include in their audit for the year ending August 31, 1985, a statement that the company might be "unable to continue as a going concern," *i.e.*, that it might go out of business.

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[1] Browning is including this Statement of Facts in its Brief to correct omissions and inaccuracies in the Petition. Because Plaintiffs prevailed at the trial court level, Browning's Statement of Facts is based on matters that are undisputed in the record.

18-V53:104-10; DX-386. Faced with that prospect, Coastal's Bill Young and Wayne Duke began meeting with bankruptcy counsel in late 1985 or early 1986. 18-V57:68-71, 114; 18-V54:37.

2. Coastal Proposed a Workout Plan That Amounted to a Ransom Demand for Unpaid-for Inventory Held Hostage by Coastal.

In January 1986, Coastal sent letters to its creditors acknowledging its "cash flow problem" and threatening bankruptcy if the creditors did not agree to Coastal's workout plan. Pet. App. 4; DX-26, DX-27; 18-V53:111-13, 118. In those letters, Coastal asked its creditors to accept the return of inventory previously sold to Coastal on credit under a plan which would have required those creditors to pay Coastal 50% of the cost of *their own inventory* and write off Coastal's indebtedness to them in order to get *their own inventory* back – even though Coastal had never paid for that inventory. Pet. App. 4; DX-27. The cash paid to Coastal by the creditors would, in turn, have been paid to Coastal's secured lender Westinghouse. Pet. App. 4. The letters concluded with a threat of bankruptcy if the proposal was not accepted by Coastal's creditors. DX-26, DX-27; 18-V53:118.

Coastal's "offer" amounted to a ransom demand for unpaid-for inventory held hostage by Coastal. In the event of a Coastal bankruptcy, Coastal's secured lender Westinghouse would take priority over the suppliers (like Browning) that had furnished goods to Coastal on credit, but had not been paid. Thus, Coastal's suppliers faced the dilemma of either (1) paying half the cost of their own unpaid-for inventory in order to retrieve that inventory or (2) risking the loss of all their unpaid-for inventory to Coastal's secured lender Westinghouse in bankruptcy.

Many of Coastal's creditors rejected Coastal's "offer." *See, e.g.*, DX-282, DX-313, DX-314; 18-V53:129-31. However, Browning (which was at risk of losing $1.3 million for inventory that it had delivered to Coastal, but for which it had never been paid) tried to work with Coastal. 18-V52:133-34; 18-V56:151-52; 18-V55:42. As a result, Browning and Coastal entered into the transactions that formed the basis for Coastal's subsequent claims against Browning. Pet. App. 4. Pursuant to those transactions, Coastal returned the Browning inventory that it had never paid for to Browning. 18-V56:185-87. Coastal contended that, under agreements reached by the parties, Browning had an obligation either to pay Coastal for the returned Browning inventory (for which Coastal had never paid Browning) or to send the unpaid-for Browning inventory back to Coastal. On April 14, 1986, Young demanded return of the inventory in question "as soon as practicable, but in no event later than April 20, 1986." Pet. App. 4; PX-37; 18-V54:30-32; 18-V55:93.

3. Beleaguered by Lawsuits and Unable to Pay Its Debts, Coastal Filed Bankruptcy.

On April 16, 1986 – a mere two days after Coastal had demanded return of the Browning inventory – Young signed a voluntary petition for chapter 11 bankruptcy on behalf of Coastal. Pet. App. 4-5; 18-V54:33, 44-45. The petition was filed with the bankruptcy court about a week later. 18-V54:44-45. By the time of its bankruptcy, Coastal was over $7.9 million in debt, had withheld checks for overdue payments totaling more than $6 million, and was approximately $225,000 behind on its payroll taxes. 18-V53:135-38; 18-V56:101.

The day after it filed bankruptcy, Coastal mailed its creditors a letter explaining that the bankruptcy had become necessary because the workout plan proposed by Coastal was not accepted by "all creditors" and because

various creditors had filed lawsuits against Coastal. Pet. App. 5; DX-38. No mention was made of Browning.

On April 28, 1986, Coastal filed the adversary proceeding that became this lawsuit, seeking, first and foremost, the return of the unpaid-for Browning inventory. Pet. App. 5; 18-V7(BK):30-71. Four days later, on May 2, 1986, the bankruptcy court held a hearing at which it ordered that the Browning inventory in question be returned to Coastal. Pet. App. 5; 18-V54:38. Browning promptly complied with the bankruptcy court's order and completed the return of the inventory by the end of May. Pet. App. 5; 18-V56:189-93.

4. Although Coastal's Wayne Duke Believed That Coastal's Claims Against Browning Were Still Worth Millions, Coastal Failed to Disclose Those Claims as Required by Bankruptcy Law.

Coastal's bankruptcy attorney testified that the "primary purpose" of the adversary proceeding filed by Coastal against Browning was to obtain "return of the inventory." Pet. App. 5; 18-V9(BK):254. After the bankruptcy court ordered the inventory returned to Coastal on May 2, 1986, Browning, Westinghouse, and Coastal's bankruptcy attorney all shared the belief that little remained to the adversary proceeding. 18-V[illegible]BK):176-77, 254-58, 390; 18-V10(BK):245-46.

Coastal's CEO Wayne Duke, however, believed that Coastal still had multi-million dollar claims against Browning. 18-V10(BK):195-99. Nevertheless, on June 6, 1986, Duke executed sworn bankruptcy schedules on behalf of Coastal that concealed the existence of Coastal's claims against Browning in violation of § 521 of the Bankruptcy Code, which requires a debtor to list on its bankruptcy schedules all its assets, including all claims and causes of action. 18-V10(BK):198-99; 18-

V12(BkDX-79):325, 439. The bankruptcy schedules filed by Coastal on June 6, 1986 failed to list Coastal's claims against Browning (which Coastal's Duke believed to be worth millions of dollars) and also listed Browning's claim against Coastal for unpaid-for inventory without categorizing that claim as contingent, disputed, or subject to setoff. Pet. App. 5-6; 18-V12(BkDX-79):325, 351, 439.

In addition, in September 1986, Duke authorized Coastal's bankruptcy attorney to execute a Stipulation of Facts that further concealed Coastal's claims. 18-V10(BK):42; 18-V9(BK):390; 18-V11(BkDX-18):91-101. Coastal executed the Stipulation in connection with a motion filed by Westinghouse (Coastal's sole secured creditor) asking the bankruptcy court to lift the automatic stay, so that Westinghouse could foreclose on and auction off Coastal's assets. The Stipulation included estimates of the kind and value of Coastal's assets and stated that the *value of Coastal's general intangibles was less than $20,000.* Pet. App. 49. Again, the claims against Browning (general intangibles) were not listed. Pet. App. 6.

Without the undisclosed claims against Browning, Coastal's liability to its only secured creditor, Westinghouse, exceeded the value of its assets. Thus, the Stipulation indicated that Westinghouse would be entitled to all of Coastal's assets, and there would be no surplus available for distribution to the unsecured creditors of the estate. The unsecured creditors, Browning among them, relied on the Stipulation in deciding to consent to the lifting of the automatic stay so that the foreclosure auction could go forward. Pet. App. 21-22, 49-50. Similarly, the Stipulation formed a basis for the bankruptcy court's decision to lift the stay and allow the foreclosure and auction to proceed. Pet. App. 50; 18-V11(BkDX-20):116-25. Since the auction disposed of the entire bankruptcy estate, the lifting of the stay was clearly *not* a minor matter as Plaintiffs suggest. Pet. 24-25.

While Plaintiffs assert that Coastal's failure to disclose its claims was inconsequential because everyone involved in the bankruptcy proceeding was aware of those claims, the Fifth Circuit correctly held that the "record contradicts that assertion." Pet. App. 21. Duke alone believed that a multi-million dollar claim existed. As the Fifth Circuit held, Coastal's "silence led Browning, the other creditors, and the bankruptcy court to believe that Coastal's claims against Browning were resolved in May 1986, when it returned the inventory." Pet. App. 22.

5. Plaintiffs Never Offered a Cogent Explanation for the Omission of Coastal's Claims.

Plaintiffs' explanations for why Coastal's $10 million claims were omitted from the bankruptcy schedules and Stipulation boiled down to indignant protests that there was never any intent to hide those claims, and that those claims somehow just slipped through the cracks. Coastal's own bankruptcy attorney admitted that the claims should have been included on Coastal's bankruptcy schedules. Pet. App. 28; 18-V9(BK):254-58, 260-62. When asked why the claims were omitted, he replied, "I can't tell you exactly why." 18-V9(BK):255-56.

Duke tried to blame Coastal's lawyers, but admitted that the lawyers had explained the bankruptcy forms to him and had told him what the various categories of items included. 18-V10(BK):200-05. In addition, he conceded that Coastal itself determined the values that should be listed on the schedules. 18-V10(BK):200-05. Neither Duke nor any other witness testified that Coastal's bankruptcy counsel advised Coastal *not* to disclose the claims. Pet. App. 29.

6. The Principals of the Bankrupt Coastal Formed a New Company (ICHI), Which Acquired Coastal's Assets at Bargain Rates and Continued in Business.

The auction of Coastal's assets that resulted from Coastal's execution of the Stipulation took place in October 1986. Once again, no mention of Coastal's claims against Browning was made in the foreclosure notice or in the advertisements for the auction or at the auction itself. Pet. App. 6; 18-V11(BkDX-22):129-38, 18-V11(BkDX-23):139-40; 18-V9(BK):390, 402-13; 18-V10(BK):245-46. Coastal's secured lender Westinghouse was the successful bidder at the auction and bought all Coastal's assets for $3.25 million by setting off the purchase price against Coastal's debt. Pet. App. 52; 18-V54:62; 18-V61:65-66; 18-V9(BK):392. The highest bid – that of Westinghouse – on Coastal's general intangibles (which included Coastal's undisclosed claims against Browning) was $2,000. Pet. App. 6.

After buying Coastal's assets at the auction, Westinghouse (which had been involved in ongoing negotiations with Coastal before the auction) turned around and sold those assets (including Coastal's undisclosed claims against Browning) to a new company formed by Coastal's principals called Industrial Clearinghouse, Inc. ("ICHI"). 18-V9(BK):323-24, 387-92; 18-V10(BK):54-55, 60-61, 152-57; 18-V61:29, 65-66. Upon the formation of ICHI, Duke, who had been the CEO of Coastal, became the CEO of ICHI. Pet. App. 7. In addition, all of Coastal's employees became ICHI employees. Pet. App. 7. As one employee of both Coastal and ICHI conceded concerning the relationship between the old Coastal and the new ICHI, "You showed up at the same office with the same people and the same inventory." 18-V54:196; *see* 18-V10(BK):73, 152-57.

Because ICHI had not paid anywhere near the true cost of the Coastal inventory, it was able to sell that inventory at discounted prices. 18-V54:196-98. Thus, the principals of Coastal were able to avoid paying the debts of that company by putting Coastal in bankruptcy, and yet managed to continue in business by having ICHI acquire, at bargain rates, Coastal's assets. Pet. App. 29-30. ICHI paid only $1.24 million for Coastal assets that it contended were worth almost $10 million – a purchase that Duke understandably described as "extremely favorable." 18-V10(BK):66-67, 71-73; 18-V12(BkDX-68):175-77. In addition, ICHI acquired Coastal's undisclosed claims against Browning without ever really having to pay for them. Although Duke had failed to include Coastal's claims against Browning in either Coastal's bankruptcy schedules or in the Stipulation, *Duke expressly insisted that those claims be specifically included among the bankruptcy assets sold by Westinghouse to ICHI.* Pet. App. 7; 18-V10(BK):54-55. As Coastal's Young put it, ICHI *"made one hell of a deal."* 18-V12(BkDX-54):62-63 (emphasis added); 18-V10(BK):188.

7. Nevertheless, Plaintiffs Pursued Claims Against Browning for Allegedly Bankrupting Coastal.

After ICHI acquired all Coastal's assets, ICHI filed an amended complaint alleging for the first time that Browning's conduct had destroyed Coastal. Pet. App. 7. In March of 1993, Browning filed a motion for summary judgment in district court (to which the adversary proceeding had been removed) seeking, among other things, the imposition of judicial estoppel against ICHI because of Coastal's failure to list the claims against Browning in its bankruptcy schedule of assets. 19-V25:4363-64, 4409-16.

On the eve of a May 1993 trial setting in district court, the bankruptcy trustee – who had twice attempted to close the estate as a no-asset case – intervened, contending that the bankruptcy estate owned the claims being pursued against Browning and raising allegations of fraudulent conduct involving Coastal and ICHI in connection with the concealment of the claims. Pet. App. 7-8; 19-V33:5351-52, 5356-57. The district court referred the matter back to the bankruptcy court to resolve which party owned the claims. Pet. App. 8.

In July of 1993, Browning filed a trial brief in the bankruptcy court that also prominently asserted judicial estoppel against ICHI. 18-V8(BK):28-35. As a result of Browning's briefs in district court and bankruptcy court, the trustee was on notice that ICHI's recovery against Browning might be barred by judicial estoppel. This should have come as no surprise since the trustee himself had pointed out the failure to disclose the claims and had raised allegations of fraudulent conduct. Pet. App. 7-8; 19-V33:5351-52, 5356-57.

Despite the trustee's fraud allegations involving Coastal and ICHI, the trustee and ICHI subsequently entered into a settlement agreement that gave ICHI (made up of Coastal's principals) ownership of all claims against Browning, and assigned only a 15% right of recovery to the trustee. Pet. App. 8; BKIV:520-38. The bankruptcy court approved the settlement and also ruled against Browning on its judicial estoppel defense, holding that judicial estoppel did not apply because the non-disclosure of Coastal's claims had been "inadvertent." BK1:484; 18-V12(BK):540-45.

The district court affirmed the bankruptcy court's ruling on judicial estoppel, and a trial took place in district court. An adverse verdict was returned against Browning, except that the jury found in Browning's favor on Plaintiffs' fraud claims. Browning appealed. The Fifth Circuit reversed and rendered judgment for Browning on

the ground that the bankruptcy court had misapplied the law of judicial estoppel, which, as a matter of law, barred Plaintiffs' claims as a result of Coastal's failure to disclose those claims. The Fifth Circuit emphasized that judicial estoppel was appropriate because of the need to discourage bankruptcy debtors from concealing claims, writing off debts, and later reaping windfalls by suing on the undisclosed claims. Pet. App. 30.

REASONS FOR DENYING THE WRIT

I. The Questions Presented in the Petition Were Not Preserved or Decided Below and Thus Have Been Waived.

This Court need not even consider the merits of Plaintiffs' Petition because the central arguments in that Petition were neither raised in nor addressed by the courts below. As a general rule, this Court will not decide arguments that were never raised or decided in the lower courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). There is no reason to deviate from that general rule here, and Plaintiffs have offered none. Indeed, Plaintiffs nowhere even tell this Court that their primary arguments concerning judicial estoppel are being raised for the first time ever in this Court.

The Petition in this case bears almost no resemblance to Plaintiffs' previous briefing. Prior to the Petition, Plaintiffs' main arguments against judicial estoppel were that the failure to disclose the claims was inadvertent and that Browning suffered no detrimental reliance. Plaintiffs have never before argued – as they do for the first time in this Court – that the doctrine of judicial estoppel should be entirely abolished. Moreover, Plaintiffs' new alternative argument that this Court should at least "give consistency to the doctrine" of judicial estoppel by eliminating alleged variations in the application of that doctrine is actually contrary to the position previously taken by

Plaintiffs. Pet. 18. Plaintiffs repeatedly told the Fifth Circuit that "hard and fast rules of judicial estoppel are not appropriate" for the equitable doctrine of judicial estoppel and that determinations concerning judicial estoppel "must depend upon the facts of the particular case" and "the equities of the entire situation." D. Br. 34; Pet. Reh. 6-7; Pet. Reh. En Banc 6.

Another new argument raised by Plaintiffs for the first time in their Petition is that the application of judicial estoppel would violate § 554 of the Bankruptcy Code. Nowhere in their briefing below did Plaintiffs cite § 554 or any other section of the Code as a reason for not applying judicial estoppel. Consequently, the Fifth Circuit did not address any such statutory arguments. In *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644-46 (1992), this Court held that a petitioner could not assert for the first time on certiorari an alternative statutory basis in the Bankruptcy Code for enlarging the bankruptcy estate. That is exactly what Plaintiffs are improperly attempting to do here.

As for Plaintiffs' argument that judicial estoppel should not be applied to a bankruptcy trustee, that argument was not urged in Plaintiffs' Fifth Circuit briefs, but rather was raised for the first time in Plaintiffs' motions for rehearing. Thus, that argument also has been waived. *See Moore v. El Paso County, Texas*, 660 F.2d 586, 590 n.4 (5th Cir. 1981).

Because the issues asserted by Plaintiffs in their Petition were not raised, explored, or developed below, and because the Fifth Circuit never had an opportunity to address those issues, certiorari should be denied.

II. There Is No Circuit Conflict on the Real Issue Raised by This Case.

Plaintiffs devote almost their whole Petition to arguments that this Court should take this "unique opportunity" to abolish the entire doctrine of judicial estoppel or at least to drastically overhaul that doctrine – arguments that were never made to the courts below. Pet.

App. 10. The general questions of whether judicial estoppel should be eliminated from federal jurisprudence, or at a minimum substantially revamped, are not presented by this case, and are far too broad and abstract to constitute appropriate issues for this Court's review. On the issue that this case *does* raise and that the Fifth Circuit did decide – whether judicial estoppel can apply as a result of a debtor's failure to disclose a claim as required by federal bankruptcy law – there is no circuit conflict. Every circuit to consider that issue has concluded that judicial estoppel can apply under such circumstances.

A. An Abstract Question Concerning the Viability of Judicial Estoppel as a Legal Doctrine Does Not Present a Case or Controversy.

In an attempt to manufacture a conflict among the circuits, Plaintiffs cast their nets extremely broadly, and present as the primary issue in their Petition an abstract question concerning the existence and application of judicial estoppel generally in federal jurisprudence. Federal courts, however, are prohibited by the case-or-controversy requirement from deciding "abstract, hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

Plaintiffs' first Question Presented concerning whether the doctrine of judicial estoppel should be abolished is exactly the kind of question that this Court has rejected as too generalized and amorphous. In *United States v. Fruehauf*, 365 U.S. 146, 157 (1961), this Court explained that it has "consistently refused to give" advisory opinions or "advance expressions of legal judgment upon issues which remain unfocused because they are not . . . precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests. . . . " While theoretical and esoteric

questions regarding the general existence and bounds of judicial estoppel may be an appropriate subject matter for treatises and law review articles, the broad issues raised by Plaintiffs are not sufficiently focused for certiorari review.

B. No Circuit Conflict Exists on the Real Issue Here – Whether Judicial Estoppel Can Apply Where a Debtor Has Failed to Disclose Claims.

Perhaps Plaintiffs framed their question so broadly because there is clearly no circuit conflict on the real issue presented by this case. Section 521(1) of the Bankruptcy Code plainly requires a debtor to disclose all assets, including any contingent or unliquidated claims. 11 U.S.C. § 521(1). Both the First and Third Circuits – the only other circuits to consider the issue – have held, like the Fifth Circuit, that where a debtor has failed to disclose a cause of action as required by § 521(1), judicial estoppel may apply. *See* 11 U.S.C. § 521(1); *Payless Wholesale Distrib., Inc. v. Alberto Culver (P.R.), Inc.*, 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931 (1993); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988).

The Petition in this case creates the erroneous impression that the Tenth and D.C. Circuits have held that judicial estoppel does not apply to the failure to disclose claims in bankruptcy schedules and stipulations. Pet. 11, 13. Thus, Plaintiffs tell this Court that "the Tenth and D.C. Circuits would not have applied judicial estoppel at all had this appeal arisen in one of those Circuits." Pet. 13. The truth is that neither of those circuits has addressed the applicability of judicial estoppel to the failure to disclose a claim as required by bankruptcy law. Therefore, it is impossible to know how those courts would resolve the issues presented in this case. A debtor's clear duty to list claims and causes of action on

bankruptcy schedules, combined with the strong policy interests in full disclosure of a debtor's assets, could well lead the Tenth and D.C. Circuits to apply judicial estoppel in a context similar to this case, even if those courts have rejected the doctrine of judicial estoppel in other contexts.

Plaintiffs also tell this Court that the "Tenth Circuit declined to apply judicial estoppel in the bankruptcy context in *Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852, 858 (10th Cir. 1997)." Pet. 11. However, Plaintiffs neglect to mention that *Golfland* did not involve the nondisclosure of bankruptcy assets or claims, and did not discuss the specific statutory duty of a bankruptcy debtor to identify all its claims and assets. Rather, *Golfland* concerned the ordinary application of general judicial estoppel principles regarding inconsistent positions taken in judicial proceedings. While *Golfland* arose in the context of a bankruptcy proceeding, it has nothing whatsoever to do with the issues involved in this case.

In order to present a conflict justifying certiorari review, Plaintiffs must demonstrate "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Plaintiffs have failed to carry that burden here. The Fifth Circuit's decision involves the application of judicial estoppel to a claim omitted from a debtor's bankruptcy schedules. On the other hand, the Tenth and D.C. Circuit cases cited by Plaintiffs involve only the general application of judicial estoppel unrelated to the bankruptcy issues presented by this case. There is no conflict among the circuits as to the real issue here.

C. Nor Is There Any Circuit Conflict as to the Nuances of How Judicial Estoppel Should Be Applied.

Nor is there any circuit conflict as to any issue raised by this case with respect to the nuances of how judicial estoppel should be applied. As an initial matter, most of the alleged conflicts posed by Plaintiffs relate to how judicial estoppel should be applied in the abstract, not in the context of claims omitted from a debtor's bankruptcy schedules, and thus are not even arguably conflicts raised by this case. *See* Pet. 20-26.

The issue whether judicial estoppel requires detrimental reliance raises no circuit conflict under the present facts. Pet. 24. Neither of the cases on which Plaintiffs rely (*Young v. United States Dep't of Justice*, 882 F.2d 633 (2d Cir. 1989), and *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567 (Fed. Cir. 1984)) involved omitted bankruptcy claims. Moreover, recognizing that some courts require reliance, the Fifth Circuit expressly found that Browning had detrimentally relied. Pet. App. 23 n.8.

There is also no circuit conflict on the issue of whether judicial acceptance is required for the application of judicial estoppel to claims omitted from bankruptcy schedules. Pet. 24-26. Here, the Fifth Circuit held that judicial acceptance is required, and that the requirement was satisfied by the bankruptcy court's decision to permit the foreclosure on Coastal's assets based on the concealment of Coastal's claims. In their attempt to create a conflict with respect to judicial acceptance, Plaintiffs once again rely primarily on cases that have nothing to do with the specific bankruptcy issues involved here. Although *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), did involve the omission of a bankruptcy claim, the Third Circuit merely observed that judicial acceptance was a "relevant" consideration

rather than an "independent requirement" – an observation that hardly makes for the stuff of conflicts review. *Id.* at 361.[2]

Likewise, no circuit conflict exists on what parties are subject to judicial estoppel. Pet. 23-24. Plaintiffs were unable to locate any circuit court cases holding that a trustee is not subject to judicial estoppel. Instead, they attempt to rely on one district court case that has nothing to do with omitted bankruptcy claims (*In re Payroll Express Corp.*, 921 F. Supp. 1121 (S.D.N.Y. 1996)), and one district court case that is unpublished (*Deloach v. Provident Health Services, Inc.*, No. CV493-120, 1993 WL 850445 (S.D. Ga. Sept. 1, 1993)). *See* 25 n.6, *infra*. As for Plaintiffs' out-of-context quotation from *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990), suggesting that judicial estoppel only applies to certain kinds of parties, it is grossly misleading. *Cassidy* did not involve the issue of what parties are subject to judicial estoppel, and certainly did not involve that issue in the context of claims concealed by a bankruptcy debtor.

Finally, there is no circuit conflict occasioned by nuances in the Fifth Circuit's discussion of intent and inadvertence. Pet. 20-23. Plaintiffs urge that the Third Circuit's decision in *Ryan* conflicts with the Fifth Circuit's analysis of inadvertence in this case. However, in holding that Coastal's omission could not have been inadvertent as a matter of law, the Fifth Circuit actually *relied* on *Ryan*

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[2] Moreover, in connection with their judicial acceptance argument, Plaintiffs mischaracterize the Seventh Circuit's cases as requiring judicial acceptance in the form of a judgment. *See* Pet. 25. In *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540 (7th Cir. 1990), and *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990), the Seventh Circuit merely held that a party must prevail only on an underlying substantive issue or fact in order to be subsequently bound by judicial estoppel – a standard that is plainly met here.

and other Third Circuit precedent. Indeed, *Ryan* itself provided the no "motive to conceal" factor adopted by the Fifth Circuit.[3] *Ryan*, 81 F.3d at 363 (distinguishing *Oneida* on the ground that in that case the debtor had a "motive to conceal" and indicating that a debtor who would only receive 9% of any recovery had no appreciable motive to conceal). *Ryan* did not hold that a debtor's intent in omitting a potential cause of action as a bankruptcy asset could never be inferred. Rather, it held only that such intent could not be inferred *"solely* from nondisclosure" on bankruptcy schedules. *Id.* at 365 (emphasis added); *see In re Okan's Foods, Inc.*, 217 B.R. 739, 755 (Bankr. E.D. Pa. 1998) (holding that, under *Ryan*, bad faith could be inferred from factors other than mere nondisclosure). The *Ryan* decision does not conflict with the Fifth Circuit's analysis in this case, especially in light of Duke's obvious motive to conceal.

D. The Distinguishable Maryland State Court Case Relied on by Plaintiffs Does Not Create a Conflict Warranting Review by this Court.

The absence of a real circuit conflict is demonstrated by Plaintiffs' need to rely on an alleged conflict between the Fifth Circuit's decision here and the decision of the

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[3] The Fifth Circuit stated, "Our review of the jurisprudence convinces us that, in considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment." Pet. App. 24. Contrary to Plaintiffs' contention, that statement about the requirements for inadvertence "in general" does not give rise to an irrebuttable presumption and leaves room for discretion in determining when a debtor has a motive for concealment (unless, as here, the evidence establishes motive to conceal as a matter of law).

Maryland Court of Appeals in *Winmark Limited Partnership v. Miles & Stockbridge*, 693 A.2d 824 (Md. 1997). However, *Winmark* is both distinguishable and not significant enough to create a conflict meriting this Court's review.

The *Winmark* court's refusal to apply judicial estoppel to a claim omitted from a bankruptcy schedule was based on that court's concern for the rights of creditors. *Id.* at 826, 829. In that case, permitting the prosecution of the undisclosed claims would have inured entirely to the creditors' benefit. *Id.* Here, by contrast, only 15% of any recovery was to be paid to the bankruptcy trustee, and that amount would be further reduced by payment of the trustee's fees and other administrative expenses under § 503 of the Bankruptcy Code. *Compare Oneida*, 848 F.2d at 417, 420 (where only one-third of any recovery would be available to creditors, judicial estoppel applied to bar claims) *with Ryan*, 81 F.3d at 363 (where 91% of any recovery would be available to creditors, judicial estoppel did not apply to bar claims).

Winmark is also distinguishable because the Maryland court in that case stressed that the parties against whom the claim was being asserted "were not creditors in the bankruptcy," and thus had not participated to their detriment in the reorganization process. *Winmark*, 693 A.2d at 825. Here, on the other hand, Browning was Coastal's largest unsecured creditor. Based on Coastal's nondisclosure of its claims in its bankruptcy schedules and in the Stipulation, Browning withdrew its objection to the lifting of the stay, which allowed all of Coastal's assets to be foreclosed upon and ultimately sold to Coastal's successor ICHI. Had Browning and the other creditors known of the undisclosed claims, their response to Coastal's motion to lift stay and their bidding at the foreclosure auction undoubtedly would have been different. Pet. App. 29.

In any event, even if *Winmark* could be viewed as in tension with the Fifth Circuit's opinion in this case, it certainly does not create a conflict warranting this Court's review. As noted above, all the circuit courts to consider the issue have agreed that judicial estoppel can, and in appropriate circumstances should, apply to a debtor's undisclosed claim. *See* 15, *supra*. In addition, numerous other federal and state courts have likewise applied judicial estoppel to omitted claims.[4] Against this backdrop of extensive authority favoring the application of judicial estoppel to claims omitted by a bankruptcy debtor, a distinguishable decision from the Maryland

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[4] FEDERAL CASES: *E.g., Chandler v. Samford Univ.*, 35 F. Supp. 2d 861, 864 (N.D. Ala. 1999); *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 57-59 (S.D.N.Y. 1999), *aff'd*, 63 F. Supp. 2d 342 (S.D.N.Y. 1999); *In re Tippins*, 221 B.R. 11, 26 (Bankr. E.D. Ala. 1998); *In re Okan's Foods, Inc.*, 217 B.R. 739, 754-756 (Bankr. E.D. Pa. 1998); *Youngblood Group v. Lufkin Federal Savings & Loan Ass'n*, 932 F. Supp. 859, 868 (E.D. Tex. 1996); *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996); *In re Fineberg*, 202 B.R. 206, 227-228 (Bankr. E.D. Pa. 1996); *Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224, 229 (D. Mass. 1996); *In re Freedom Ford, Inc.*, 140 B.R. 585, 587 (Bankr. M.D. Fla. 1992); *In re H.R.P. Auto Center, Inc.*, 130 B.R. 247, 254 (Bankr. N.D. Ohio 1991); *In re Little*, 126 B.R. 861, 868 (Bankr. N.D. Miss. 1991); *Pako Corp. v. Citytrust*, 109 B.R. 368, 376-377 (D. Minn. 1989); *In re Louden*, 106 B.R. 109, 112 (Bankr. E.D. Ky. 1989); *In re Hoffman*, 99 B.R. 929, 934 (N.D. Iowa 1989); *In re Galerie Des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 259-260 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986).

STATE CASES: *E.g., Int'l Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App. 4th 345, 75 Cal. Rptr. 2d 178 (1998); *Conrad v. Bank of America*, 45 Cal. App. 4th 133, 137-38, 53 Cal. Rptr. 2d 336 (1996); *Cafferty v. Thompson*, 223 A.D.2d 99, 644 N.Y.S.2d 584 (1996); *Southmark Corp. v. Trotter, Smith & Jacobs*, 442 S.E.2d 265 (Ga. App. 1994); *Luna v. Dominion Bank of Middle Tennessee, Inc.*, 631 So. 2d 917 (Ala. 1993); *Caplener v. United States Nat'l Bank of Oregon*, 857 P.2d 830 (Or. 1993); *Zwemer v. Product Credit Ass'n of Midlands*, 792 P.2d 245 (Wyo. 1990).

Court of Appeals certainly does not justify a conflicts review by this Court.

III. Given That There Is No Circuit Conflict, the Applicability of Judicial Estoppel to a Claim Omitted From a Bankruptcy Schedule Does Not Raise a Significant Issue Worthy of Certiorari Review.

A. The Fifth Circuit Properly Applied Judicial Estoppel to a Claim Omitted by a Bankruptcy Debtor.

Plaintiffs argue for the first time in their Petition that the Fifth Circuit's decision to judicially estop a bankruptcy trustee from recovering on an undisclosed cause of action violates § 554 of the Bankruptcy Code. That section sets forth the procedures for abandoning estate property and provides that unabandoned property remains property of the estate. 11 U.S.C. § 554. Pet. 5. Contrary to Plaintiffs' new argument, the Fifth Circuit's decision does not disturb settled law. It is a long-standing principle of bankruptcy law that, when a debtor fails to list a cause of action as an asset on its bankruptcy schedules, judicial estoppel applies to bar prosecution of the undisclosed claim. *See* 15, 21 n.4, *supra.* Plaintiffs' observation that an undisclosed claim remains property of the bankruptcy estate unless abandoned under § 554 misses the point because claims asserted by a bankruptcy trustee are subject to all defenses (such as judicial estoppel) that could have been asserted against the debtor. *See Bank of Marin v. England,* 385 U.S. 81, 87 (1966) and authorities cited at 24 n.5, *infra.*

Nor is the application of judicial estoppel inconsistent with § 704 of the Bankruptcy Code, which instructs the trustee to "collect and reduce to money the property of the estate . . . as expeditiously as is compatible with the best interests of the parties in interest. . . . " Section 704 is

simply an enabling statute that in no way enlarges the trustee's rights to take actions beyond the rights previously possessed by the debtor. *See Integrated Solutions, Inc. v. Service Support Specialities*, 124 F.3d 487, 494 (3d Cir. 1997). Thus, there is no conflict between § 704 and legal principles (such as judicial estoppel) that have the effect of limiting recovery by, on behalf of, or as successor to a bankruptcy estate. *See id.*

The wide acceptance of the application of judicial estoppel to claims omitted from bankruptcy schedules arises from the vital importance of full disclosure of all known assets of the debtor on such schedules. As the Fifth Circuit explained in this case, the "integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets." Pet. App. 18, quoting *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996). Complete disclosure is crucial so that creditors can make informed decisions and so that the bankruptcy system can function effectively. *See Ryan*, 81 F.3d at 362. When a debtor seeks the benefits of bankruptcy relief, it must satisfy its statutory duty of candidly disclosing its assets, including any claims or causes of action that the debtor may possess. *See In re Mahan*, 104 B.R. 300, 302 (Bankr. E.D. Cal. 1989). Failure to disclose known claims as required by bankruptcy law consistently results in application of judicial estoppel with respect to those claims. *See* 15, 21 n.4, *supra*.

B. Judicial Estoppel Applies to Undisclosed Claims Pursued by the Bankruptcy Trustee or Other Parties in Privity with the Debtor.

Nor can judicial estoppel be avoided by having a claim pursued by the bankruptcy trustee instead of by the debtor itself. As this Court has long recognized, a bankruptcy trustee succeeds to only such rights as the debtor possessed, and the trustee is subject to all defenses that

could have been asserted against the debtor. *See Bank of Marin v. England*, 385 U.S. 81 (1966); *Vartman v. First Nat'l Bank of Waterloo*, 216 U.S. 134, 138 (1910).[5]

Accordingly, even if an undisclosed claim remains property of the estate subject to the claims of creditors, judicial estoppel not only bars recovery by a debtor acting on its own behalf, but also bars recovery by a trustee or any other party who succeeds to the rights of the debtor. *See In re Fineberg*, 202 B.R. 206, 227-28 (Bankr. E.D. Pa. 1996) (claims not disclosed by a debtor may be subject to judicial estoppel even when the claims are asserted by a bankruptcy trustee); *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 57-59 (S.D.N.Y. 1999), *aff'd*, 63 F. Supp. 2d 342 (S.D.N.Y. 1999) (assignee of debtor having same president as debtor was judicially estopped from asserting claims omitted from bankruptcy schedules by the debtor); *In re Charter Executive Center Ltd.*, 34 B.R. 131, 134 (Bankr. M.D.

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[5] The Senate and House Reports also reflect that a trustee or successor can "take no greater rights than the debtor himself had." H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978). When Congress wanted a trustee not to be subject to the same defenses as the debtor, it clearly knew how to so provide as reflected in its enactment of a special statute of limitations rule for trustees in § 108(a) of the Bankruptcy Code. Had Congress intended to exempt the trustee from the ordinary operation of judicial estoppel, it would have done so via a Code provision similar to § 108(a). *See also* the following circuit cases holding that a trustee can take no greater rights than the debtor itself had: *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996); *Stumpf v. Albracht*, 982 F.2d 275, 277 (8th Cir. 1992); *Matter of Sanders*, 969 F.2d 591, 593 (7th Cir. 1992); *In re Schauer*, 835 F.2d 1222, 1224 (8th Cir. 1987); *Angeles Real Estate Co. v. Kerxton*, 737 F.2d 416, 418-19 (4th Cir. 1984); *Wyle v. R.J. Reynolds Ind., Inc.*, 709 F.2d 585, 592 (9th Cir. 1983); *South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Texas*, 614 F.2d 1056, 1061 (5th Cir. 1980); *In re Easy Living, Inc.*, 407 F.2d 142, 144 (6th Cir. 1969).

Fla. 1983) (the assignee of a debtor's property interest is subject to any defense the obligor had against the assignor).

Judicial estoppel applies to undisclosed claims even where the effect is to reduce or eliminate recovery by unpaid creditors. *See Oneida*, 848 F.2d at 420; *Pako Corp. v. Citytrust*, 109 B.R. 368, 376 (D. Minn. 1989). The policy interests in full disclosure and finality simply outweigh the creditors' competing interests in payment – especially where, as here, the creditors would only receive a small fraction of any recovery, and the debtor or its successors would reap the benefits of the nondisclosure. *See id.* As a result, ICHI and the bankruptcy trustee cannot avoid judicial estoppel by pointing to their status as a successor to the debtor or as a trustee of the bankruptcy estate.[6]

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[6] Plaintiffs cite two district court cases for the proposition that judicial estoppel should not be applied to a bankruptcy trustee. Pet. 23, citing *In re Payroll Express Corp.*, 921 F. Supp. 1121 (S.D.N.Y. 1996), and *Deloach v. Provident Health Services, Inc.*, 1993 WL 850445 (S.D. Ga. 1993). *Payroll* did not involve the failure to disclose a claim. Moreover, although *Payroll* was not itself an action involving a trustee's special avoidance powers (such as the power to avoid or set aside preferences), *Payroll* relied exclusively on cases that did involve a trustee's special avoidance powers, and thus *Payroll* incorrectly applied avoidance concepts in a nonavoidance context. *See Sender v. Simon*, 84 F.3d at 1304 (distinguishing between avoidance actions and successor actions pursued by a trustee); *In re Ostrom-Martin, Inc.*, 188 B.R. 245, 251 (Bankr. C.D. Ill. 1995) (only when a trustee exercises his avoidance powers does he acquire rights greater than those possessed by the debtor itself). As for *Deloach*, it is an unpublished district court decision that cites *no* authority for its conclusion. The *Deloach* court's lack of understanding of the issues is reflected by the fact that it did not realize that a chapter 11 debtor in possession itself assumes all the rights, powers, functions and duties of a bankruptcy trustee. *See* 11 U.S.C. § 1107(a). *Deloach* is an aberration inconsistent

C. In Any Event, This Case Is Not an Appropriate Vehicle for Considering Whether Judicial Estoppel Should Be Applied to an Innocent Third-Party Purchaser or an Unsuspecting Trustee.

Perhaps the most troubling aspect of Plaintiffs' Petition is its attempt to cast this case as presenting the issue of whether judicial estoppel should be applied to the claims of an innocent third-party purchaser or of an unsuspecting trustee. Here, it is undisputed that 85% of any recovery was to go to the corporation formed by the principals of the debtor that failed to disclose its claims as required by bankruptcy law. As a result, any recovery would end up in the pockets of the very person (Wayne Duke) who initially concealed the claims in bankruptcy court and later bragged about having made an "extremely favorable" bargain in purchasing the claims for a fraction of their believed value. This case in no way involves innocent third-party purchasers.

As for the bankruptcy trustee in this case, he voluntarily surrendered ownership of 100% of Coastal's claims to ICHI in exchange for an assignment of only 15% of any recovery, which would be further reduced after payment of trustee fees and other administrative expenses as required by the Bankruptcy Code. 11 U.S.C. § 503. It would be nonsensical to allow those responsible for the concealment of the claims to profit to the tune of 85% of any recovery just so that the trustee could recover 15%, less administrative fees and expenses.

Moreover, at the time the trustee chose to settle with ICHI, the trustee was fully aware of the debtor's alleged fraudulent conduct, the nondisclosure of the claims, and Browning's assertion of judicial estoppel. *See* 10-11, *supra*.

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with the mainstream view that judicial estoppel can bar omitted claims. *See* 15, 21 n.4, *supra*.

Nevertheless, the trustee decided to enter a settlement agreement with ICHI that compromised the trustee's claims and made recovery hinge on ICHI's success in litigating against Browning.

In applying judicial estoppel to the concealed claims, the Fifth Circuit relied on the policy of full disclosure and the interests of the bankruptcy system as a whole. If debtors or their successors were permitted to reap the benefits of their concealment and hold trustees hostage by dangling before them a small percentage of any recovery, then the interests of full disclosure would be thwarted, and the bankruptcy system as a whole would be jeopardized.

Judicial estoppel exists to protect the integrity of the judicial system. Pet. App. 11-12. At some point, courts have the right to declare that they will not allow the judicial system to be used as a vehicle for unconscionable results arising from a shameless switching of positions in the litigation process. That point was reached and surpassed here. Plaintiffs were attempting to accomplish the very thing that judicial estoppel is designed to prevent: "conceal [their] claims; get rid of [their] creditors on the cheap; and start over with a bundle of rights." *Payless*, 989 F.2d at 571. Although Coastal's Duke bragged about having made an "extremely favorable" deal and Young crowed about having made "one hell of a deal," it was a deal that contravened the principles of judicial estoppel as the Fifth Circuit correctly held. Indeed, if ever a case demonstrated why judicial estoppel should *not* be abolished, this is the case.

IV. Defects in Plaintiffs' Causation Proof Under Texas State Law Independently Support the Judgment of the Fifth Circuit.

As a prevailing party, Browning is entitled to urge any ground for affirmance that would support the judgment below, whether or not the court below relied on or considered that ground. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984). Even if Plaintiffs were not judicially estopped from asserting their claims as the Fifth Circuit held, the Fifth Circuit's decision reversing the judgment in favor of Plaintiffs was still correct because, among other reasons, Plaintiffs' causation proof was legally insufficient under Texas state law.

The linchpin of Plaintiffs' causation theory was that Coastal was forced to file bankruptcy because of Browning's brief delay in returning to Coastal certain inventory that Browning had previously sold to Coastal, but for which Coastal had never paid Browning in the first place. Plaintiffs urged that theory even though (1) the delay in returning the inventory was short and Browning promptly returned the inventory after being ordered to do so by the bankruptcy court (18-V56:189-93); (2) while Plaintiffs asserted that the value of the Browning inventory in question was about $1.6 million, Plaintiffs admitted that Coastal had about *$13.4 million* worth of other inventory available for sale (18-V57:140-42); (3) Coastal was on the verge of bankruptcy before any of Browning's allegedly wrongful conduct occurred (*supra* at 3-4); and (4) Coastal declared bankruptcy before Browning even had any duty to have completed the return of the inventory to Coastal (18-V54:30-33, 44-45; PX-37; 18-V55:93).

The evidence on which Plaintiffs rely to try to prove their causation theory is exactly the kind of evidence that has been condemned as inadequate to establish causation under Texas law. In *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995), the Texas Supreme

Court recognized that unsubstantiated, conclusory, and speculative opinions of a party – such as the opinions offered in this case – cannot prove causation as a matter of law. Just as the plaintiffs in *Haynes & Boone* could not recover because they failed to prove that the languishing shopping center involved in that case would have survived anyway, Plaintiffs in this case cannot recover because they failed to prove that the desperately troubled Coastal would have survived. *Id.* Any connection between Browning's brief delay in returning the inventory and Coastal's bankruptcy is simply too attenuated to provide a basis for liability under Texas law. *See Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995).

Nor did Plaintiffs establish causation through testimony of their expert that, if Coastal's proposed workout plan had been implemented, Coastal would have had a good chance of succeeding. 18-V56:69, 91. It is undisputed that the plan by its terms "required 100-percent participation" by all creditors, but that numerous creditors had decided not to participate. 18-V57:198-99, 129-33; 18-V53:129-31; DX-282, DX-313, DX-314. Plaintiffs' expert admitted that he was unaware that a significant number of Coastal's creditors had rejected Coastal's workout plan. 18-V56:136-37. Because the expert's opinion was based on the successful implementation of Coastal's plan, and since that plan could not have been implemented because it was not accepted by all Coastal's creditors, the expert's opinion had no probative value. Under Texas law, when "an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or a judgment." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

Since the district court's judgment would have had to be reversed based on the absence of legally sufficient causation evidence (as well as numerous other errors)

regardless of the Fifth Circuit's judicial estoppel ruling, certiorari should be denied in this case.

CONCLUSION

For the foregoing reasons, Browning respectfully requests that the petition be denied.

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No. 99-756

Supreme Court, U.S.
FILED
JAN 7 2000
CLERK

In The

Supreme Court of the United States

JEFFREY H. MIMS, Trustee of the Estate of Coastal Plains, Inc., and INDUSTRIAL CLEARINGHOUSE, INC.,

Petitioners,

v.

BROWNING MANUFACTURING, A Division of Emerson Power Transmission Corporation; and Formerly a Division of Emerson Electric Co.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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1300

TABLE OF CONTENTS

Page

REPLY TO BROWNING'S REASONS FOR DENYING THE WRIT 1

I. Contrary to Browning's contention, this case creates a deep and well-developed split in the Circuit Court of Appeals on an important issue of federal law, *viz.*, whether and to what extent the doctrine of judicial estoppel applies in federal cases, and bankruptcy cases in particular 1

II. Browning's claim that the questions presented in the petition were not fairly preserved in the courts below is specious 4

III. No disputed or unique facts make this case unsuitable for Supreme Court review 6

IV. Causation poses no obstacle to the resolution of this case, and was correctly resolved by the lower courts in any event 6

REPLY TO BROWNING'S STATEMENT OF FACTS 7

I. Misconduct by Browning was the cause of Coastal's demise 7

II. Coastal never concealed any claims from the respondent 8

III. The trustee's sharing agreement is fair, and irrelevant to the legal issue on appeal 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Cleveland v. Policy Management Systems Corp., 119 S.Ct. 1597 (1999) 1

Lebron v. Na'l R.R. Passenger Corp., 513 U.S. 374 (1995) 4, 5

Moore v. El Paso County, Texas, 660 F.2d 586 (5th Cir. 1981) 5, 6

Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996) 3

United States v. Beggerly, 524 U.S. 38 (1998) 7

Virginia Bancshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 5

STATUTES

11 U.S.C. § 323 9

11 U.S.C. § 554 5

11 U.S.C. § 704(4) 4

MISCELLANEOUS

18 *Moore's Federal Practice* §§ 134.30 *et seq.* 2

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In its Opposition, Browning unfortunately has chosen to use its "statement of facts" as a weapon to attempt to cloud the issues for review. Undoubtedly, this case has been hotly contested at every level, and certainly the parties dispute many facts. But the factual disputes were resolved against Browning by the bankruptcy court, the trial court, and the jury (and not challenged on appeal), and should not distract this Court from the important questions about judicial estoppel and bankruptcy law presented by this case.[1]

REPLY TO BROWNING'S REASONS FOR DENYING THE WRIT

When one looks beyond Browning's statement of facts to its asserted legal justifications for this Court to deny the Petition, it becomes evident that each falls flat. Browning presents four basic arguments why this Court should deny this Petition. None is telling.

I. Contrary to Browning's contention, this case creates a deep and well-developed split in the Circuit Courts of Appeals on an important issue of federal law, viz., *whether and to what extent the doctrine of judicial estoppel applies in federal cases, and bankruptcy cases in particular.* Petitioners are not the first to notice the deep division over this issue; courts and respected commentators alike have taken notice and commented upon the split. *See, e.g., Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 1597, 1601 (1999) (listing different judicial estoppel rulings by the Circuits on the same question) (Pet. 13 n.5). The authors of Moore's

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[1] All facts material to this case were presented by the trustee and Industrial in their petition. *See* Pet. 5-10. Lest silence in the face of Browning's unfounded accusations be taken for acquiescence, however, petitioners have reluctantly included a short response to Browning's attacks at the conclusion of this brief, *see infra* at 8-10. It explains why both judges and jurors have found that Browning, not Coastal or Industrial, committed misconduct in this case, why that misconduct caused Coastal's demise, and why that misconduct warranted a multi-million dollar sanction.

federal practice have observed that there are uniformity problems in the federal law of judicial estoppel resulting "from the lack of guidance from the Supreme Court." 18 *Moore's Federal Practice* §§ 134.30 *et seq.* (Matthew Bender 3d ed. 1999). Browning attempts to obscure the well-known split on this issue, which is fairly presented by the facts of this case, by essentially re-writing the questions presented by the petitioners, narrowing them almost to the point of absurdity before reaching the conclusion that the courts are in agreement. *See* Opp. 15 (phrasing issue as whether judicial estoppel "appl[ies] to the failure to disclose claims in bankruptcy schedules and stipulations," rather than whether judicial estoppel is recognized by federal law generally, or in the bankruptcy context in particular). But the simple fact remains that whereas two Circuits have rejected judicial estoppel in its entirety in federal law cases, properly criticizing the doctrine as an outmoded impediment to the search for truth, Pet. 11, 15, the Fifth Circuit applied judicial estoppel forcefully in this case. The Court need not and should not wait for a Circuit to reject judicial estoppel in the specific context of a failure to disclose in a bankruptcy case involving undisclosed claims in bankruptcy schedules prior to addressing this issue.[2]

The fundamental disagreement over the existence of federal judicial estoppel alone would merit review by this Court, but the divisions in the lower courts run still deeper. The Fifth Circuit applied an extreme form of judicial estoppel that included a rule of "inferred intent," which requires application of judicial estoppel in bankruptcy nondisclosure cases *even if contrary to* the facts as established by a bankruptcy court's findings and a jury's verdict. The Fifth Circuit's ruling thus creates fundamental and outcome-determinative conflicts with other Circuits in bankruptcy cases, even among those Circuits recognizing the doctrine. Pet. 18-19, 20-26.

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[2] Such a case would never arise in a Circuit that has rejected the doctrine outright; it follows *a fortiori* that a circuit that does not recognize the doctrine at all does not follow the doctrine in that particular instance.

Although the Third Circuit applies judicial estoppel in federal cases generally, in *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), that court reversed the district court's application of judicial estoppel in a bankruptcy case, expressly *rejecting* the defendant's argument that courts should apply a doctrine of "inferred intent" to satisfy the requirement that a debtor must have failed to disclose a claim *intending* to deceive. The Third Circuit held that the determination of a debtor's intent should be left to the factfinding capabilities of the bankruptcy court.[3] In conflict, the Fifth Circuit overrode the bankruptcy court's factual findings that Coastal had no intent to deceive by declaring that factor not relevant and applying instead a rule of inferred intent. This conflict merits resolution by this Court.

Browning attempts to sidestep the Circuit conflict over whether a defendant's reliance on a debtor's nondisclosure is an essential element of judicial estoppel, Pet. 24, by asserting that "the Fifth Circuit expressly found that Browning had detrimentally relied." Op. 17. The Fifth Circuit did not make any such express finding. Rather, the Fifth Circuit went no further than to state in a footnote that "there is evidence" of reliance. Pet. App. 23 n.8. The bankruptcy court, which did make "findings," found that Browning "knew all along that damages were being sought against it," and that Browning was not "misled by failure to list the lawsuit in the Schedules, nor by the Stipulation, or order on the motion to lift stay . . . " (Pet. App. 64-65).

If left standing by this Court, the opinion below will upset uniform and effective application of Chapter 7 and thwart the intent of Congress in enacting that chapter of the Bankruptcy Code. The Fifth Circuit's decision *extinguishes* unscheduled claims belonging to the debtor's estate, even in the hands of the trustee and after a jury has found the claims

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[3] *Ryan* also rejected the proposition advanced by Browning (Opp. 21) that omitted claims are routinely judicially estopped. There, the Third Circuit reviewed many of the same cases cited in the Opposition and declared that it was "not persuaded by their analysis." 81 F.3d at 364.

valuable and meritorious. Yet, § 704(4) of the Code requires trustees to search for and liquidate claims that were *not* scheduled by debtors. Pet. 27. By exalting the Bankruptcy Code's requirement for debtors to schedule claims above all else, the Fifth Circuit has rendered Code section 704(4) nonsensical, converting it into a requirement that trustees engage in a meaningless search.

II. Browning's claim that the questions presented in the Petition were not fairly preserved in the courts below is specious. Browning overlooks the fact that the petitioners were the *appellees* in the Fifth Circuit, and it was Browning, not the petitioners, who urged the Circuit to apply judicial estoppel after both the bankruptcy and district courts refused to do so. As appellees, petitioners were under no duty to list every possible rationale in support of the decision below in order to preserve that argument for appeal in the event of an adverse ruling.[4] The issue Browning presented to the Fifth Circuit was broadly stated: "Whether Plaintiffs' claims are barred by the doctrine of judicial estoppel,"[5] and the petitioners' broad response in the lower courts was that the claims were not so barred. "Once a federal claim is properly presented, a party can present any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (*quoting Yee v. Escondido,* 503 U.S. 519, 534 (1992)).

Petitioners consistently have maintained at every necessary point in this litigation that they should not be judicially estopped from asserting or recovering on the claims against Browning found meritorious by the jury. Indeed, after the Fifth Circuit's reversal of the lower courts by applying judicial estoppel as a matter of law, petitioners sought panel and *en banc* rehearing, arguing that that the Tenth and D.C.

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[4] Petitioners briefed numerous defenses in the Fifth Circuit, including that the bankruptcy court did not abuse its discretion by refusing to apply judicial estoppel.

[5] Appellant Browning's Brief in the Fifth Circuit at 23.

Circuits reject judicial estoppel altogether and describing the conflicts between the Fifth Circuit's rule of "inferred intent" and the rules in other Circuits.[6] These issues are properly presented here. *Lebron*, 513 U.S. at 379; *Virginia Bancshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

Browning's argument that petitioners waived the right to rely on Bankruptcy Code § 554 in support of their claim misstates the point. Opp. 13. The Code deals with the matter of unscheduled assets in the estate of the debtor, and takes those assets from the debtor and *preserves* them in the hands of the trustee for the benefit of creditors. Contrary to the Fifth Circuit's view, the Code does not need to be patched, amended, or overlaid with the common law doctrine of judicial estoppel; and the Fifth Circuit's apprehension that Chapter 7 debtors may "emerge" from bankruptcy to profit from undisclosed claims was erroneous and misplaced.

Browning's contention that petitioners "waived" the point that judicial estoppel should not be applied to the trustee is also without merit. Opp. 13. Petitioners contended in each of the three courts below that judicial estoppel should not be applied to *either* the trustee or Industrial. The bankruptcy court concluded that Coastal's tort causes of action had always remained the property of the trustee (Pet. App. 8, 63), and were not subject to Browning's claim of judicial estoppel (Pet. App. 70). Although Browning ultimately succeeded on appeal in convincing the Fifth Circuit to ignore the corporate distinctions between the debtor (Coastal) and Industrial, none of Browning's arguments applied to either the trustee's or Coastal's *tort* causes of action. When the Fifth Circuit overlooked these distinctions, both well-developed in the record below, petitioners focused on the distinctions in their motions for rehearing.[7]

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[6] *See* the Trustee's and Industrial's Petition for Rehearing En Banc 6-7, 11-12 (filed July 14, 1999) and Petition for Panel Rehearing 6-7 (filed July 9, 1999).

[7] *See* Petition for Rehearing En Banc 7-11; Petition for Panel Rehearing 1-5. Browning's citation to *Moore v. El Paso County, Texas*, 660

III. No disputed or unique facts make this case unsuitable for Supreme Court review. Indeed, the opposite is true. The case comes to this Court after a bankruptcy court has entered findings of fact pertaining to judicial estoppel. Browning contested *none* of those findings of fact on appeal as clearly erroneous.[8] The case also comes here after a jury has decided all disputed facts about whether Browning breached contracts and committed torts against Coastal and whether Browning's actions caused damages to Coastal. The district judge who presided over the jury trial denied all of Browning's motions challenging the jury's findings for insufficient evidence. Browning correctly concedes that the Fifth Circuit applied judicial estoppel in this case *as a matter of law*. Opp. 12. All the facts in this case have been adjudicated, but the Court of Appeals overrode them with the inferred intent doctrine. Absent review by this Court, bankruptcy cases in the Fifth Circuit – but not in other Circuits – will be governed by the Fifth Circuit's policy choices rather than the factual findings of the lower courts. This conflict and the consequent damage to the public interest in uniform implementation of the Bankruptcy Code warrant granting the Petition.

IV. Causation poses no obstacle to the resolution of this case, and was correctly resolved by the lower courts in any event. Browning spent much time before the district court jury arguing that there was no causal link between its breaches of contracts with Coastal and its torts against Coastal and Coastal's demise. After the jury decided that question of fact

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F.2d 586, 590 n.4 (5th Cir. 1981), is inapposite. *Moore* held only that the defense of limitations, not pleaded as an affirmative defense in the trial court, was waived. *Id.* Although Fifth Circuit jurisprudence generally prohibits the addition of issues on appeal for the first time on rehearing, that did not happen here. The trustee's position in the Fifth Circuit consistently was that the lower courts properly refused to apply judicial estoppel against him.

[8] Appellant Browning's Brief in the Fifth Circuit at 32 n.11.

against Browning, Browning moved the district court, unsuccessfully, to grant judgment or a new trial on causation;[9] then Browning argued lack of causation, based on Texas law, in the Fifth Circuit. Much of the Opposition argues the same point. Browning's argument, simply put, is that Coastal was already a sick company, and that Browning should not be held liable for maliciously taking actions against Coastal.

The causation point was not passed on by the Fifth Circuit and poses no obstacle to review of the questions presented in the Petition. Indeed, it is not unusual for this Court to remand cases to the lower courts to address other issues after it decides important questions of federal law. *See, e.g., United States v. Beggerly,* 524 U.S. 38, 49 (1998). In any event, substantial evidence supports the jury's finding of causation. *See infra* at 7-8.

REPLY TO BROWNING'S STATEMENT OF FACTS

Browning's 10-page "Statement of Facts" ignores the fact that the bankruptcy judge and the jury – both of whom heard all the evidence – decided nearly every question of fact against Browning. Petitioners will briefly comment on three issues in the Opposition that are most in need of correction.

I. Misconduct by Browning was the cause of Coastal's demise. When the Texas economy and the oil industry turned down Coastal experienced serious cash flow problems. In a 1985 letter that Browning colorfully (but grossly inaccurately) portrays as a "ransom demand," Opp. 4, Browning, with the consent of Westinghouse (its secured creditor) proposed to its creditors a "new business plan" whereby Coastal's inventory (most of which had been paid for by Coastal with its own cash or loans from Westinghouse) would be purchased back by Coastal's suppliers for cash and account credits, and Coastal would thereafter hold the inventory for sale on consignment. The plan also proposed that Coastal would execute promissory notes for amounts owed on account to its creditors and pay those notes over 36 months (Def. Exh.

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[9] Order, September 16, 1997, 18-V4:677.

26, 27). An alternative to the plan was a Chapter 11 filing. Westinghouse, Coastal's secured creditor, held a security interest in all inventory in Coastal's possession.

Browning, *Coastal's primary supplier*, agreed to Coastal's plan, but insisted that Coastal physically return all of the Browning products in Coastal's inventory to Browning's warehouses. Browning promised promptly to return that inventory to Coastal pursuant to a consignment agreement. Browning obtained possession of Coastal's inventory, but then breached its agreements by refusing to pay for or return the inventory. Without Browning products, Coastal could not fill customer orders for industrial parts. The inventory in effect served as Coastal's blood supply. After Coastal remained without goods to sell for some time, "Coastal's phones just stopped ringing." 18-V54:162-63. Coastal was bled dry.[10]

Although Coastal had been told by a dismayed Browning employee in early 1986 that Browning was formulating a plan neither to return Coastal's inventory nor pay for it, 18-V53:4: confirmation of the maliciousness of Browning's plan was found only by later discovery of internal Browning documents. Browning's documents recorded a plan to hold on to Coastal's inventory, force Coastal into bankruptcy, and then purchase the inventory at a depressed price of 30 cents on the dollar Pl. Ex. 38. Consistent with this scheme, Browning commenced selling its products in Coastal's territory through other distributors. One of those distributors testified that, in effect, Browning offered him "Coastal's head on a platter." 18-V60:24.

II. Coastal never concealed any claims from the respondent. It is undisputed that (1) Coastal pleaded its claims in an

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[10] Browning's credit manager admitted at trial that Coastal would have remained viable had Browning carried out its agreements with Coastal. 18-V56:27. Browning's president testified that Coastal probably would have survived. 18-V56:152. Finally, Coastal's fact and expert witnesses detailed for the jury the plans for saving Coastal and how those plans would have worked but for Browning's actions. *E.g.*, 18-V53:50-51; 18-V56:53-69.

adversary complaint filed and served almost immediately after Coastal filed its Chapter 11 petition (Pet. App. 5, 43), and (2) the bankruptcy court found, after an evidentiary hearing (in findings of fact never challenged as clearly erroneous) that Browning, Westinghouse and the trustee were aware of Coastal's claims at all material times, and that Coastal, its officers and attorneys, had not engaged in any fraud on the court (Pet. App. 64-65, 68, 80). Coastal's adversary proceeding against Browning was discussed at a meeting of Coastal's creditors and was common knowledge. 18-V9(BK):163; 18-V10(BK):56, 228-30).

Browning seeks to detract from the Petition by pointing to the undisputed fact, *see* Pet. at 7, that Industrial was formed by Mr. Duke, former CEO of the now-defunct Coastal. Browning overlooks the fact that Industrial purchased Coastal's assets from *Westinghouse*, a third-party unsecured creditor, for $1.24 million. Pet. App. 7. The bankruptcy court found that Westinghouse always knew of Coastal's claims against Browning. Pet. App. 64, 65. Westinghouse had no incentive other than to sell Coastal's assets for the highest price available.

III. The trustee's sharing agreement is fair, and irrelevant to the legal issue on appeal. Browning unsuccessfully tried to attack the trustee's sharing agreement before the bankruptcy court, the district court, and the Fifth Circuit in a prior appeal, but each of those courts approved the trustee's agreement. Pet. App. 8-9. Browning tries again here by pretending that no trustee for the estate is present. But the trustee is present and is representing the interest of the estate, including all creditors. 11 U.S.C. § 323. The trustee agreed to the sharing mechanism with Industrial based on proper consideration, *i.e.*, Industrial's agreement to relieve the trustee of any obligation to fund the litigation or pay attorneys fees.[11] The trustee and Coastal's creditors would certainly prefer to have

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[11] Without this agreement the estate could not have proceeded with the adversary case; the estate had been closed and its assets distributed. *See* Pet. App. 54.

15% of the judgment reversed by the Fifth Circuit (which would have entitled them to approximately $750,000) over an empty pocket.

In any event, Browning's factual argument does not dispense with the need for review because the Fifth Circuit's decision is one of general applicability, and will bar claims against inadvertently unscheduled assets even where 100% of the recovery would go to creditors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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